United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-1149

To be argued by
STEVEN DUKE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1149

—o—

UNITED STATES OF AMERICA *Appellee,*

—against—

VINCENT PACELLI, JR. *Appellant.*

BRIEF FOR APPELLANT VINCENT PACELLI, JR.

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NO. 75-1149

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

vs.

VINCENT PACELLI, JR.,

Appellant

Appeal from a Judgment of the United States District Court for the Southern District of New York.

APPELLANT'S BRIEF

STATEMENT OF ISSUES

1. The court improperly and prejudicially precluded cross-examination on three vital matters.

2. The court erroneously refused to permit a psychiatric examination of Lipsky.

3. The court erroneously excluded expert psychiatric testimony.

4. The court should have granted a judgment of acquittal.

5. The court abused its sentencing discretion.

STATEMENT OF THE CASE

Defendant Vincent Pacelli, Jr. was convicted before Judge Charles Stewart and a jury on both counts of a two-count indictment. Count 1 charged that he violated 18 U.S.C. § 241 by conspiring, with Barry Lipsky, to deprive Patsy Parks of her right to be a witness at trial, causing her death. Count 2 charged a violation of 18 U.S.C. § 1503 in using force to impede or injure Parks on account of her being a witness.

After a two week trial, the jury returned verdicts of guilty on January 31, 1975. On February 28, 1975, Judge Stewart sentenced Pacelli to serve life in prison, said service to commence on the expiration of the thirty-five year sentences Pacelli is presently serving for violation of the narcotics laws. Judge Stewart also imposed the maximum permissible sentence on Count 2, five years, and made it concurrent with the sentence on Count 1 (A. 883).*

The trial below was Pacelli's seventh in the Southern District of New York since February, 1972, during the entire period of which he has been in prison. Each of the seven prosecutions was for conduct allegedly occuring between April, 1971 and February, 1972, a period of ten months. Five of the previous six prosecutions were for violations of the federal narcotics laws, during that ten-month period.[1] The other, which was the fourth in sequence, was the first trial on the present indictment. There, as here, Pacelli was convicted on both counts, and his conviction was reversed by this Court for improper admission of prejudicial hearsay and

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* Reference is to the Appendix.

1 A summary appears in United States v. Mallah, 503 F. 2d 971 (2d Cir. 1974), cert den., U.S. (1975) (Douglas, J., dissenting). A fuller description is contained in appellant's brief in that case, 74-1327.

failure to disclose Jencks Act material. United States v. Pacelli, 491 F. 2d 1108 (2d Cir. 1974), cert den., 419 U.S. 826.

As in the first trial of the instant indictment, the Government relied below almost entirely on the testimony of the alleged unindicted co-conspirator, Barry Lipsky. As in the first trial, the defense claimed that Lipsky had murdered Parks alone or with someone other than Pacelli, and that he was falsely implicating Pacelli in the murder. The defense was therefore an attack on Lipsky's credibility.[2] Unlike the first trial, however, the defense offered substantial extrinsic evidence below to discredit Lipsky's story.

STATEMENT OF FACTS

The Prosecution

The body of Patsy Parks was found by a police officer in a wooded area in Massapequa, Long Island, about 9:35 a.m. on February 4, 1972. Her throat had been cut, she had been stabbed in the chest nine times (T. 1004)* and her body burned by gasoline flames (T. 998).

On March 2, 1973, Barry Lipsky arrived at La Guardia airport from Miami, Florida, where he was met by Federal and State agents (A. 255) and questioned about the murder of Parks. At first he made up a story (A. 666),

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2 That Lipsky is especially dubious as a witness is suggested not only by the impeaching facts brought out below (see infra), but by the fact that in Pacelli VI, the jury acquitted one defendant and acquitted Pacelli on three counts, rejecting Lipsky's testimony. United States v. Mallah, supra, note 1. Juries also rejected Lipsky's testimony and acquitted all defendants in United States v. Catino, et al., before Judge Ward, in June, 1973, and in United States v. Sperling et al., 73 Cr. 441, (a re-trial of some of the appellants in United States v. Sperling, 506 F. 2d 1323 (2d Cir. 1974), before Judge Bonsal in April, 1975. In United States v. Fernandez, 506 F. 2d 1200, 1204 (n.11) (2d Cir. 1974), this court referred to Lipsky as an "extreme example" of a "sleazy" witness.

* Reference is to the trial transcript.

but after being physically struck (A. 564), admitted participating in the murder, but claimed he was assisting Pacelli. When asked whether he had any business relationship with Pacelli, Lipsky said he had none (A. 459).

Lipsky's direct testimony at the trial below tracked his testimony at the first trial. He swore that he met Parks, whom he knew casually (A. 186), in the Hippopotamus nightclub in Manhattan around 12:30 a.m. on February 4, 1972 (A. 187). She told him she wanted "to talk to Vinny" because two men had "come to my door...with a paper with my name on it and [it] has something to do with a case, I believe" (A. 189). Lipsky told her to wait and he would deliver her message (A. 192). He then took a cab to Pacelli's apartment in New Rochelle (A. 193), arriving around 2:00 a.m. (A. 195). Lipsky went around back and threw pebbles on the bedroom window (A. 195-6). Pacelli's wife and Ida Bracer looked out (A. 196). Lipsky indicated he wanted to come in, then went around front, entered the building and went upstairs where he met Pacelli, Al Bracer, Ida Bracer, Pacelli's wife Beverly and Barbara Jalaba, Pacelli's sister-in-law (A. 197). In the presence of all, Lipsky told Pacelli what Parks had told him (A. 197). Pacelli said "It's that box. It's that god-damned box. She has been to the grand jury and she ratted me out" (A. 197). He then allegedly said, "I know what I have to do" (A. 198).

Bracer then took the three women into the bedroom (A. 198). Pacelli asked Bracer if he wanted to go with him but Bracer declined. He then asked Lipsky and Lipsky said, "Yes" (A. 198).

Pacelli, who had been standing in his underwear (A. 480), got dressed (A. 198). He and Lipsky then drove toward Manhattan in a rented Plymouth

(A. 199). On the way, they stopped at a gas station and purchased four cans of gasoline "to burn up her body" (A. 201).

When they got to the Hippopotamus, Pacelli sent Lipsky in for Parks and some matches (A. 205). The three then drove out on Long Island about 2:30 a.m. (A. 206).

During the trip, Pacelli told Parks he thought the paper "has something to do with a case of mine which may be coming up soon, and I think its about that box" (A. 212). Pacelli said he was going to give her "a bunch of money" and she could go away for awhile (A. 213). Parks replied that she couldn't leave because of her job and her child (A. 213). She also supposedly kissed Pacelli and told him, "I would never hurt you or Beverly. I love you both. You are both my dearest friends" (A. 214).

Later, they stopped, Pacelli pretended to make a phone call (A. 217), and Lipsky took the wheel. A few seconds later, Pacelli raised up over the backseat and stabbed Parks in the throat (A. 218). Parks then said, "Vinny, Vinny, don't hurt me, my child. I am a mother," to which Pacelli allegedly responded, "What? Are you kidding. Die you bitch," and he proceeded to strike her repeatedly in the chest with the knife (A. 219).

Lipsky then drove a few minutes (A. 219) into a dark area. Pacelli removed the body and poured gasoline over it (A. 220). Lipsky then dropped a match on the body, causing flames to flare up about 20 feet or so (A. 221). Lipsky stood there looking at the flames (A. 221). The two then returned to New Rochelle. On the way, they filled up the car with gas in Manhattan (A. 224), and discarded the contents of Parks' pocketbook (A. 225).

In New Rochelle, near Pacelli's home, in broad daylight, Lipsky tossed the knife into a body of water near a boatyard (A. 226). At Pacelli's

apartment house, Lipsky threw Parks' pocketbook and Pacelli's boots (A. 229) down the trash chute (A. 230).

Pacelli told his wife, who was there, to check their clothes for blood and, "if you have any grass or any coke or any money in the house," to get rid of it as "they are going to be coming" (A. 229).

Lipsky and Pacelli then took some Ajax and other cleaning materials and, returning to the body of water, cleaned the blood out of the car (A. 230). As Lipsky cleaned, Pacelli threw the gas cans into the water (A. 231). The two then returned to Pacelli's and went to sleep (A. 233).

After he awoke, Lipsky heard Pacelli's wife tell Pacelli that she and her sister had spent an hour cleaning blood out of the car (A. 234).

Lipsky, Pacelli, Pacelli's wife, Barbara Jalaba, and Abbe Perez then returned the rented car (A. 234-5). Perez, who was going to look for rugs for his new apartment, took Lipsky back to Manhattan (A. 236).

Later that day, on Pacelli's instructions, Lipsky, using one of his credit cards, rented another car and gave it to Pacelli (A. 238). The two had dinner together that night (A. 239). On that occasion, Pacelli allegedly said "It's a good thing I did what I did when I did it, because I have been in communication with my lawyer and he told me my trial is about to start next Tuesday" (A. 240).

Four or five days later (A. 242) Pacelli, in Lipsky and Bracer's presence, told Perez to "tell your friend Frankie" to "get out of town or he is going to get the same thing that happened to the girl" (A. 248).

Some time after Parks' body had been identified (A. 249), Lipsky met with Bracer and Perez (A. 250). They gave him $1,000 and told him to go to

Florida, which he did on February 11 (A. 254).[3]

In addition to Lipsky's testimony, the Government proved that Parks had testified before a federal grand jury on May 27, 1971 (T. 73), and that an effort had been made to serve her with a subpoena on February 3, 1972 (T. 83, 93), in connection with a forthcoming trial in which the Pacellis, Elisa Possas and Jimmy Papadakos, who lived upstairs from Parks and were friends of hers(T. 143), were defendants (T. 85).

A 1972 Plymouth Fury, rented by Pacelli's wife and claimed by Lipsky to be the murder car, was returned on February 4, 1972 (T. 777). The agent who received it noticed nothing unusual about its condition (T. 789) and did not recall who checked it in (T. 788).

The Government also established that the same car returned by Pacelli's wife on February 4th was rented on February 16th by Al Bracer (T. 785) and found afire in New Jersey on the 18th (T. 853), when it was doused with water by firemen (T. 854).

A Nassau County lab technician examined the car and tested the floor mat. Although admitting that Ajax, which Lipsky claimed to have used to clean the mat (A. 513), contains silicates which are not water soluble and leave residues (T. 973), the technician found no traces of Ajax or of other cleaning material (T. 929-30). He did find two minute spots which he concluded were probably blood, though he couldn't be positive (T. 929). The spots were not aged or typed (T. 947). In fact, it couldn't be determined whether they were of human origin (T. 947). The technician even admitted that his positive results could have been produced by rust (T. 980, 984-5).

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3 Although clearly ruled out on the first appeal, 491 F. 2d at 1115-18, this hearsay was admitted again, over objection (A. 253).

Nassau County investigators took Lipsky, on May 3, 1972, to the Cameron Boatyard in New Rochelle and ascertained from him the spot where he claimed to have tossed the knife (A. 531, T. 1235). Thereafter, about fifteen Nassau County police (T. 812, 1243) conducted a six day search of the area, with garden rakes and metal detectors (T. 812) on each day (T. 813), from the time the tide started going out until it came back in -- about five hours a day (T. 839). After the detective in charge of the search concluded that the knife was not thrown where Lipsky indicated it was thrown (T. 1242), the detective in overall charge of the homicide investigation appeared and promptly raked up out of the mud a knife meeting Lipsky's description (T. 821).

The Defense

The defense conceded that Patsy Parks was brutally murdered (T. 1000) and that Lipsky had participated, possibly with a companion, but denied that Pacelli was involved. The defense took the following lines:

A. Motive

Parks' grand jury testimony (T. 74) and her statements to her roommate Patty Quinn indicated that Parks could not seriously incriminate Pacelli. Parks didn't know his last name (T. 76), hardly knew him (T. 163), had seen him pick up a box once from Frank Serrano but didn't know what was in it (T. 79-80, 148). Lipsky, however, by his own admission in the narcotics business (A. 182), may have had his own motives to do away with Parks. He knew her (A. 452). Parks' friends upstairs (T. 87, 143), Elisa Possas and Jimmy Papadakos, were also defendants (T. 85) and Parks knew they were in the cocaine business (T. 74). Benny Fabre, Lipsky's former roommate, had also been in the narcotics business (A. 594), was apparently a friend

of Parks (T. 157, 170), and was told by Parks in the Hippopotamus about the subpoena (T. 210). Fabre, who testified at the first trial, was unavailable for the second. His prior testimony was read in (T. 209). Finally, Parks had testified in a murder case (T. 138), claimed to be an F.B.I. informant (T. 139), and indicated to her roommate that even her boyfriend might kill her if he knew (T. 150). Thus, several people had motives to kill Parks, but Pacelli was not one of them.

B. Improbability

In addition to the inherent improbabilities in Lipsky's story,[4] the

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4 A few of the improbabilities of the story: (1) Lipsky said he threw pebbles at a bedroom window so as not to "alarm" the Pacelli's (A. 466) when he could have buzzed and talked on the intercom (T. 1463); (2) at about two o'clock in the morning, Pacelli was in his underwear while Ida and Al Bracer were there, fully clothed (A. 480); (3) Lipsky got a cab from mid-Manhattan to New Rochelle for $12-$14 (A. 546); (4) after sending Parks out of the Hippopotamus to meet Pacelli, Lipsky sat at a table with their friend Fabre for ten minutes and neither said a word (A. 490); (5) Pacelli had known for months about Park's testimony before the grand jury; it was common gossip (A. 459, 483-484), yet Pacelli appeared surprised when Lipsky delivered Park's message on February 4th (A. 197); (6) Although Parks told the grand jury she didn't know Pacelli's last name (T. 76), told her roommate she had only seen him two or three times (T. 128) and "really didn't know him" (T. 163), Lipsky claimed she kissed Pacelli and said, "You and Beverly are my dearest, closest friends, I love you both" (A. 214); (7) Lipsky said Parks refused to leave town because of her child (A. 495), yet earlier that day, she told her roommate that because of the subpoena she planned to go away for awhile (T. 150, 156), and her child was in its father's custody (T. 123); (8) Lipsky who had trouble sleeping at night (A. 392), dozed off in the car while accompanying Parks to her death (A. 214); (9) after Parks' throat was cut, she said "Don't hurt me, I'm a mother"(A. 505); (10) Pacelli said, "Die you bitch" (A. 219); (11) Pacelli was yelling, "get my glasses, I can't see" (A. 524); according to Lipsky, Pacelli "can't see at all without glasses" (A. 525, 527), but he plainly can (A. 525). (12) Lipsky swore that in the dark, while driving the car, he saw Pacelli, in the back seat, make a gesture at his waistline indicating Parks was dead (A. 219, 506); (13) Lipsky swore Pacelli said "She is dead" immediately after stabbing her (A. 219), yet according to the medical examiner, she probably lived another 7 to 10 minutes after being stabbed (T. 1011); (14) Pacelli allegedly burned Parks to

defense established that Lipsky, according to that story, drove sixty-seven miles (T. 1378) after the murder, crossed six bridges over water (T. 1374), drove alongside water on 25 percent of the trip (T. 1377), and passed directly over 540 storm sewers before planting the knife a block and a half from Pacelli's home.

The trash chute in Pacelli's apartment house, where Lipsky claimed to have thrown Parks' pocketbook and Pacelli's boots after Pacelli said the police would be coming to investigate the murder (A. 539), was not connected to an incinerator (T. 1461). Pacelli's apartment, moreover, had a buzzer system and an intercom (T. 1463) which Lipsky could have used rather than throwing pebbles at a window in the back (A. 466).

C. External Contradictions

Lipsky swore repeatedly that he stood at the water's edge and threw the knife about 20 feet into water (A. 227, 532, 533). The defense established by an expert witness, however, that at the time Lipsky claimed to have tossed the knife, the tide was out and the water line was beyond the floating dock (T. 1428), which measured 245 feet from the spot (T. 1368) where Lipsky insisted he stood at the water's edge and tossed the knife (A. 517). Lipsky would have had to have thrown the knife in an unmistakable mud flat.

(4 cont.) prevent her identification, yet the murderer left her wearing a mass of highly visible inscribed jewelry (T. 1013); (15) Pacelli expressed concern about leaving gas cans with possible fingerprints at the scene of the crime (A. 222) yet without rubbing the prints off, threw them in the water and left them floating near his home (A. 541); (16) Pacelli's trial date had been set on January 27, 1972 (T. 89), yet Lipsky claimed Pacelli told him on February 4th or 5th that he first heard about it after the murder (A. 240, 496); (17) Pacelli told Lipsky, after the murder, that Parks was " a key witness against him" (A. 496), yet plainly she was not; it is doubtful she had anything relevant or competent to say about him.

Lipsky claimed to have cleaned the murder car with Ajax powder (A. 513) which contains non-water soluble silicates (T. 973), but no such chemicals were found in police lab tests of the mat of the Pacelli car (T. 929-30).

Lipsky swore that he and Pacelli "filled up with gas" in Manhattan (A. 521, 224), after the murder, then drove the car the short trip to New Rochelle. The car rental agency's records, however, showed that when Pacelli's wife checked the car in on February 4th, the tank was 3/4 empty -- enough gas to have driven almost two hundred miles (T. 789).

D. Prior Inconsistencies

Lipsky gave statements in Nassau County on March 2 and 3, 1972. He swore below that these statements were true (A. 443-44, 515). Yet in neither statement did he say that Al and Ida Bracer were at Pacelli's when he arrived (A. 465, 489). He said only Pacelli's wife opened the curtains (A. 464). Nor, in either statement did he say anything about Barbara Jalaba being present (A. 132, 482).

Although vehemently denying below that he poured any gasoline on Parks (A. 507), Lipsky swore to the grand jury which returned the indictment that he not only dropped the match, he poured the gasoline (A. 508).

Although swearing below that he saw all the stabbing, Lipsky said on March 3, 1972 that he saw nothing (A. 504-5).

Lipsky testified on direct that Pacelli told him to get matches in the nightclub (A. 205). He denied on cross that after Pacelli threw the gasoline, he asked Lipsky, "Do you have a match?" (A. 509), but when confronted with his statement to that effect on March 3, Lipsky changed his story (A. 526).

Lipsky on March 3 also quoted Pacelli as saying, on the trip back from Long Island, that he planned to throw the knife from a dock "up near the house in New Rochelle" (A. 529). Lipsky denied the truth of that statement below (A. 530).

Lipsky swore below that he was in the narcotics business with Pacelli (A. 182). Yet he denied any illegal relationships in March, 1972, while confessing to murder (A. 459).

E. Lipsky's Dishonesty

Although a college graduate, Lipsky's life, by his own account, was a melange of swindles, con games, and lies. Kicked out of college for stealing and selling a classmate's books (A. 399), Lipsky, as a stockbroker, knowingly sold stolen stock in Florida (A. 264-5). When questioned by his employers, he lied (A. 265). When questioned by the F.B.I., he lied (A. 266). When questioned by a federal grand jury, he lied (A. 266). Even after pleading guilty in the stock case, he lied to his attorney about it (A. 269, 275). In a successful effort to get probation, Lipsky on October 28, 1972, while engaged in the narcotics business, falsely told a probation officer he was gainfully, lawfully employed (A. 277) and had a friend write a phony letter to that effect (A. 278). Even after pleading guilty to manslaughter in 1973, after admitting to being in the narcotics business and so testifying in several prosecutions, Lipsky repeated the same lies about gainful employment to the Nassau County probation officer (A. 551-2).

On April 11, 1972, Lipsky was told by his attorney that he had a "verbal contract of immunity" with the Government and he wouldn't be prosecuted for anything he told them (A. 291) or for "any damn thing"

(A. 392); that he had "complete transactional immunity" (A. 294). Yet that very same day, he swore to a federal grand jury that he believed what he said could incriminate him and cause his indictment (A. 285).

Later, in two federal jury trials (against Pacelli) in June and December, 1972, Lipsky falsely denied any promises or understandings with the Government (A. 316-331) and any conversations with his attorney about same (A. 331). This testimony, Lipsky admitted, was also lies (A. 299, 316, 322, 324, 333).

Lipsky further lied in the first trial of this case when he denied knowledge of the Government's help in getting his Nassau County murder charge reduced to manslaughter (A. 414-417).

Lipsky also swore in a trial in Florida in August, 1974, that he never intended Patsy Parks any harm (A. 447). He told his attorney the same thing (A. 450). These too were lies (A. 447, 450).

Although Lipsky was gainfully employed at the time and also engaged in profitable swindles on the side, Lipsky's mother have him $57,000 during 1968 and 1969 (A. 278). He expressed his gratitude by forging her name to $18,000 worth of checks (A. 279).

Among Lipsky's most bizarre swindles was $20,800 he took from a stock customer by taking phony sports bets -- he told the customer which team he had bet on after the games had been played (A. 558). He also relieved another acquaintance of $20,000 on the promise he would go to Puerto Rico and buy cocaine (A. 554).

F. Lipsky's Mental Illness

In addition to a pattern of perverse dishonesty, the defense established that Lipsky shot out a TV set with his pistol in 1967 or 1968

(A. 351) because the picture was rolling (A. 355); got angry at some scales, blaming them for his failure to lose weight, jumped up and down on them and threw them into Biscayne Bay (A. 352-53). He also held a pistol to his brother's head to win a fight (A. 353) and, while in jail in Nassau County, banged his head against a wall because he was angry at a guard (A. 396).

He admitted striking his hand against walls in anger a dozen times (A. 397). And after first denying it, he then admitted doing it in the witness room the day before during the trial of this case (A. 398). Although denying he was violent (A. 356), he admitted to frequent temper tantrums (A. 356). While in Nassau County jail, he said his mental condition deteriorated rapidly (A. 359-60, 365).

Lipsky has had trouble sleeping since 1967 (A. 392). He used cocaine, marijuana, hashish, alcohol and barbiturates, in various combinations, from 1967 to 1972 (A. 391-95, 400). He still takes barbiturates (A. 264). Indeed, he took some during the trial (A. 264).

When he was on cocaine, from 1967-72, he sometimes used it twenty times a day (A. 395). He said in December, 1972 that he used it on "almost a daily basis for a long time" (A. 393).

Lipsky is an afficianado of horror films (A. 410), even adopting the alias, "M.T. Graves," of a horror film character (A. 410), a nom de plume he stills uses in correspondence with narcotics agents (A. 410). Other aliases included "Mr. Holmes," "Morris Stroud," and "Wart" (A. 401). Lipsky also entertained his friends by making faces back at the TV set (A. 412) and, while watching horror programs, made faces and noises to scare children (A. 681).

Lipsky signs letters and cards with a claw (D. Ex. P), regards inmates and guards as "mentally inferior" (A. 360-61) and blamed the prosecutors for the mistrials and reversals caused by his perjury (A. 646).

He summed himself up in a letter from jail to his sister:

> "... You want to play truth with me -- it's a game I play better than you. Maybe you were unaware that I am completely without emotional feelings that most straight people have.... I am a violent, vindictive, warped-minded cynic of a magnitude that you have absolutely no conception of.... I am now on a floor where they keep the nuts or psychos as they call them here. The things these lunatics do and say only amuses me and I wish I could be allowed to go near them to steam them up and laugh at them.... (A. 374)

To Lipsky, the oath means "you sit here and swear to tell the truth..." (A. 423). He does not know what "morally" means (A. 362).

G. Fabricated Evidence -- The Knife

The defense attempted to prove that the knife recovered from the Cameron Boatyard on March 13, 1972 was not thrown there by Lipsky on February 4 but was manufactured evidence. Several strands of proof strongly supported the defense theory:

1) An extensive five-day search of a small area of mud, with rakes and metal detectors, produced a conclusion by the officer in charge of the search (T. 832) that the knife was not there (T. 1242). Sgt. Walker, in charge of the homicide investigation, then entered the search on the sixth day around noontime (T. 812), began photographing the scene at 1:30 (T. 817), and then allegedly raked up G. Ex. 4 from 4 to 6 inches of mud (T. 833) about 3:50 (T. 819), in an area that had obviously been covered many times.

2) In an experiment conducted by the defense, two identical knives were dropped in the same body of water, in approximately the same area where G. Ex. 4 was allegedly recovered (T. 1344). One knife was in the

water two weeks (T. 1337, 1340), the other, two days. Neither knife when retrieved was covered with mud; both remained on the surface (T. 1340-41).

3) When G. Ex. 4 was allegedly removed from the mud, it was shiny (T. 825). A police photograph taken at that time (T. 835) shows it to be rust-free (G. Ex. 17, D. Exs. ZZ, YY, MM., T. 1382), yet the defense knife which was in the water only two weeks was heavily rusted (D. Ex. OO), and the two-day knife was already markedly rusted (D. Ex. PP, T. 1564).

4) Nassau County Police Detective Gerald Jetter, a lab technician, tested G. Ex. 4 for blood, and found a minute stain on the cutting edge (T. 1112) which he concluded was blood (T. 1112a) beyond serious doubt (T. 1117).[5] Yet neither knife placed in the water by the defense investigators showed any signed of blood (T. 1309), although both had been saturated with blood, dried before being dropped in the water (T. 1337), carefully removed (T. 1341), and tested by the same methods Jetter had used on G. Ex. 4 (T. 1113, 1310). In the opinion of Dr. Alexander Weiner, head of serology, office of the Chief Medical Examiner of New York City (T. 1281), author of at least 650 scientific articles on blood analysis (T. 1282), and co-discoverer of the Rh factor (T. 1283), dried blood on a knife placed in water will not remain more than a few hours, a day at most (T. 1290-91). Moreover, even if blood had been on the blade of Ex. 4, it would have been removed when raked up out of the mud (T. 1294). It is "inconceivable," Dr. Weiner concluded, that blood could survive such handling (T. 1294).

5) The knife was not found anywhere near where Lipsky said he tossed it (T. 823).

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5 Jetter had testified for the prosecution in the first trial that he found blood on the knife.

H. The Burned Plymouth

To rebut the implication that Pacelli had Bracer rent the murder car and burn it to destroy evidence, the defense called the rental agent and the car jockey. The rental agent testified that Bracer was a frequent customer (T. 1083). When he rented the Plymouth in February, he just came in the office and asked to rent a large car (T. 1084). The agent called the car jockey and asked him to deliver "a large car" (T. 1084). At that time, the agency had ten or fifteen Plymouth Furies available, any one of which would be a large car (T. 1086). The car jockey who selected the Fury for Bracer corroborated the agent. No customer was ever in the garage area (T. 1458) and no customer ever asked him for a specific automobile (T. 1459).

Regarding the stains on the car's carpet, Dr. Weiner testified that he examined the mat and found nothing indicative of blood (T. 1314). Nor were the tests conducted by the Nassau County technician indicative of blood (T. 1313). The reactions were not meaningful; the tests were pointless (T. 1315) and were consistent with the presence of inorganic material (T. 1314, 1329) or rust (T. 1319). The "less you say about it the better" (T. 1331).

The Sentencing

At the sentencing below, the government deviated from its normal policy against making sentencing recommendations (A. 873) and submitted a memorandum recommending that the court impose the maximum permissible sentence -- life consecutive to the 35 years the defendant is already serving. In response, the defendant argued that:

1) The consecutive life sentence would exceed the sentence imposed

by Judge Tenney after defendant's first trial on this indictment (life consecutive to a 20 year sentence). Such a harsher sentence on retrial following defendant's successful appeal would violate North Carolina v. Pearce, 395 U.S. 711 (1969) (A. 862-3).

2) The maximum sentence should be 35 years and concurrent with the 35 years defendant is serving for two narcotics convictions. Humane and civilized principles of sentencing, defendant submitted, militate against a sentence that would strip him of any hope of redemption or rehabilitation and would guarantee he would die in prison. Society's interest in deterrence was amply served by a 35 year sentence.

3) The presentence reports prepared for Judge Pollack in sentencing defendant previously on the two narcotics convictions most likely reflected the facts surrounding the Parks murder and were taken into account twice by Judge Pollack in giving defendant a harsh sentence of 35 years (A. 863-4). Defendant was effectively being punished, counsel argued, a third time for the Parks murder. Defendant's request for access to the earlier presentence report was denied (A. 865).

4) The defendant stood before the court as a first offender, since the crime was committed before any prior convictions (A. 865).

In imposing the maximum sentence on the defendant,[6] the court below merely referred in very general terms to the need for protection of the public and deterrence of others in view of the brutal nature of the offense and expressly took into account "in particular...the two prior convictions in this court for very serious crimes" (A. 882-3). This truncated articulation of the justification for the maximum sentence imposed consumed no more than 30 seconds.

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6 Speaking in his own behalf, defendant asserted his innocence and protested the suborning of perjured testimony by the government (A. 867).

ARGUMENT

I.

THE COURT IMPROPERLY AND PREJUDICIALLY PRECLUDED ANY CROSS-EXAMINATION ON THREE VITAL MATTERS.

While the trial judge permitted some cross-examination of Lipsky about bizarre behavior and dishonesty, he quite improperly precluded any inquiry at all into three matters of far more direct significance in assessing Lipsky's credibility.

A. The Court precluded the defense from asking Lipsky any questions about a prior occasion when he perjuriously implicated Pacelli in a narcotics transaction.

In June of 1972, when Pacelli and Luis Lombardero a.k.a. Valentine were on trial for violations of the federal narcotics laws (Pacelli II, 72 CR. 664), Lipsky swore that on September 28, 1971, he had dinner with Pacelli at the Yellowfingers Restaurant in Manhattan (A. 890), where Pacelli told Lipsky that Lombardero would be arriving and that Lipsky should provide Lombardero with some cocaine (A. 891). According to Lipsky's testimony in that trial, Lombardero did arrive, the three men had a conversation at the table and Lombardero or Pacelli gave Lipsky Lombardero's car keys (A. 892-4). Lipsky then left the two others there, drove Lombardero's car home, loaded it with cocaine, and returned to Yellowfingers (A. 894-5, 909). He went back in the restaurant, sat down (A. 914), and talked to Pacelli and Lombardero about the cocaine (A. 909-10). He swore he then handed the car keys and registration to Pacelli who handed them under the table to Lombardero, who waited a minute or so and left (A. 914).

Unknown to Lipsky, he was tailed by two narcotics agents that night. As one of them testified for the prosecution in a February, 1972 trial of Lombardero, the agent saw Lombardero enter Yellowfingers on September 28, 1971. From outside, looking through the picture windows, he saw Lombardero meet Lipsky and hand him an object (A. 921). Lipsky then left, drove Lombardero's car to Lipsky's apartment, returned and entered Yellowfingers (A. 922-27). This detective plainly did not see Pacelli because Pacelli was not there.

At the trial below, defense counsel asked permission to question Lipsky about his prior testimony in Pacelli II with the intent, if Lipsky denied its falsity, of offering the detective's testimony and establishing that Lipsky perjuriously insinuated Pacelli in a transaction between himself and Lombardero (A. 631-2). Counsel explained that the purpose was to show "that in December of 1972 Lipsky falsely and perjuriously implicated Pacelli in a criminal offense." The court forbade any inquiry on the matter as "remote" and "basically irrelevant" (A. 633).

The cogency of the inquiry, had it been permitted, need not be left to conjecture. In United States v. Mallah, 73 CR. 881 (Pacelli VI), Judge Pollack permitted it (A. 916), it was heavily relied upon in summation (A. 931), the jury inquired about it during deliberations, and then found Pacelli not guilty on all three counts charging distribution of cocaine (See Appellant Pacelli's brief in 74-1327, pp. 7, 32).

In United States v. Mallah, 503 F. 2d 971, 976 (2d Cir. 1974), this court said that "extrinsic evidence is admissible to show a special motive to lie or fabricate a case against a defendant." Although upholding exclusion of extrinsic proof that a Government witness threatened to frame

another man, the court did so partly on the ground that the "extortion scheme was directed against Sam Kaplan, not against any of the defendants in this case," and was therefore merely proof of bad character.[7] 503 F. 2d at 976-7. Here, on the other hand, the victim of Lipsky's prior frame was the very defendant on trial. Moreover, it was closely related to the issues on trial. Lipsky explained his alleged participation in the Parks murder and gave it some plausibility be swearing on direct that he was working for Pacelli in the narcotics business (A. 182). Proof that on a prior but recent occasion, covering the same period of alleged employment, he lied under oath about a narcotics transaction with Pacelli would have greatly undermined his testimony implicating Pacelli in a narcotics-related murder.[8]

The standard red cover response -- that this line of cross was cumulative and added nothing to what had already been proved -- would be wide of the mark. The Yellowfingers perjury was of a wholly different

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7 Furthermore, defendants had been permitted in Mallah to make detailed inquiries on the matter during cross-examination, and the witness's "admission to participating in the extortion plot shed a good deal of light on his credibility. The disputed evidence would have added little additional candle power..." 503 F. 2d at 977.

8 Lipsky's claim that he worked for Pacelli in the narcotics business was inextricably related to his testimony about the murder. When he first confessed to the murder, Lipsky denied any business relationship with Pacelli. The state prosecutor indicated disbelief of the story (A. 171). Deciding that narcotics was top priority with the federal people (A. 594), and believing the Nassau County authorities wanted his blood and his life and were going to give him 99 years (A. 583), Lipsky contacted the federal people (A. 587). He hoped that if he could get Pacelli indicted, and get federal help, his plight would be considerably eased (A. 582, 587). He then involved Pacelli in the narcotics business. Lipsky was right. Since the murder, Lipsky has never been prosecuted for anything by federal authorities (A. 355) and is now eligible for state parole on the Parks killing.

genre from Lipsky's other lies. There was no evidence before the jury that any of the other perjuries was directed against Pacelli, or even that they involved false accusations. The perjuries proved that Lipsky had no respect for the oath and had a perverse need to lie, but they had no direct bearing on the credibility of his testimony implicating Pacelli.

As this Court noted in United States v. Cardillo, 316 F. 2d 606, 613 (2d Cir. 1963), "Disclosure of a direct lie relating to the event testified to might have far more influence on the court's ultimate decision than testimony merely establishing the unsavory character of the witness by admission of prior crimes."

Lipsky's prior false implication of Pacelli in the narcotics business was evidence not only of perjurious propensities but of specific bias against Pacelli. Bias is never collateral, United States v. Lester, 248 F. 2d 329, 334 (2d Cir. 1957); United States v. Haggett, 438 F. 2d 396, 399 (2d Cir. 1971); United States v. Blackwood, 456 F. 2d 526, 530 (2d Cir. 1972). A willingness to give perjurious testimony about the defendant or the matters on trial is evidence of bias, since it shows the witness' feelings and leanings as between the prosecution and the defense. Ewing v. United States, 135 F. 2d 653 (D.C. Cir. 1942). McCormick, Evidence § 40, at 80 (2d ed. 1972). The defense is entitled to prove any facts tending to indicate partisanship of the prosecution witness even if they are not criminal or dishonest, e.g., coaching other witnesses, Sunderland v. United States, 19 F. 2d 202 (8th Cir. 1927), causing defendant's arrest on another charge, People v. Lee Ah Chuck, 66 Cal 667, 6 Pac. 859 (1885); a previous quarrel, Wyan v. United states, 397 F. 2d 621 (D.C. Cir. 1967);

and see cases cited in United States v. Lester, 248 F. 2d 329, 334 (2d Cir. 1957). A fortiori, a previous but closely related effort to frame the defendant, in the same court, for the same prosecutor's office, as part of the same deal, can be proved, both by cross-examination and extrinsic proof. Cf. Salgado v. United States, 278 F. 2d 830 (1st Cir. 1960). Here, the court prohibited any inquiry at all.

United States v. Haggett, 438 F. 2d 396 (2d Cir. 1971), compels reversal. There, defendant, charged with misapplying bank funds, asked the Government witness if he had sought to elicit false testimony against defendant from three bank customers. He denied it. Defendant then offered to refute his denial by calling three bank customers. The trial court's exclusion of their testimony was held reversible error. It "is irrelevant ...that the loans of these witnesses were not the subject of the indictment. It is the [witness'] alleged hostility...and alleged willingness to manufacture evidence in order to secure Haggett's conviction that defendant ...was entitled to elicit from these witnesses" 438 F. 2d at 399. "Evidence of all facts and circumstances which 'tend to show that a witness may shade his testimony for the purpose of helping one side of the cause only' should be received." Ibid. If Haggett was entitled to call witnesses to prove an effort by the prosecution witness to frame him, was not Pacelli entitled to inquire? If this improper preclusion was reversible error in a case involving misapplying bank funds, was it not reversible error when imposed on a defendant facing life after thirty-five years?

Lipsky's perjury against Pacelli in June, 1972 was not, as the court thought, "remote" (A. 658). As the Supreme Court recently said, "a partiality of mind at some former time may be used as the basis of an

argument to the same state at the time of testifying," Davis v. Alaska, 415 U.S. 308, 317 (n. 5) (1974) (quoting 3A Wigmore, Evidence § 940, at 775 (Chadbourne rev. 1970)). In this case, moreover, Lipsky's relationship with the Government when he lied in Pacelli II was essentially the same as it now is.[9]

It is one thing to cut off a line of inquiry when it gets repetitive or pointless. It is quite another to preclude any questioning at all. As to acts of misconduct affecting credibility, "the matter resting within the discretion of the judge is merely the extent to which such examination may be pursued. To refuse the right to examine at all with respect to such matters is reversible error." Pullman v. Hall, 55 F. 2d 139 (4th Cir. 1932). See also, Alford v. United States, 282 U.S. 687 (1931); District of Columbia v. Clawans, 300 U.S. 617, 632 (1937); Davis v. Alaska, 415 U.S. 308 (1974); United States v. Wolfson, 437 F. 2d 862, 875 (2d Cir. 1970).

Evidence that the witness has given false testimony, for the same prosecutor's office, against the same defendant, concerning the same matters about which he testified for the prosecution in the case at hand, is not only powerful proof of animus toward the defendant, it proves bias in quite another way. The prior perjury would be provable even if it had not involved the defendant at all. Prior crimes by a prosecution witness -- of which perjury is one -- show the witness' vulnerability to prosecution and thus his motivation "to make sure that [his] testimony did not disappoint the prosecution." United States v. Padgent, 432 F. 2d 701, 705 (2d Cir. 1970)

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9 Moreover, Lipsky gave similar testimony in July, 1973 in United States v. Sperling, 73 CR. 441, in which Pacelli was also a defendant (A. 911). Lombardero testified in that same trial that he did indeed meet Lipsky at Yellowfingers, but Pacelli wasn't there (A. 927).

(reversal for exclusion of evidence of witness' bail jumping). Accord, United States v. Lester, 248 F. 2d 329 (2d Cir. 1957) (reversal for excluding extrinsic proof that witness participated in illegal contract); Davis v. Alaska, supra, 415 U.S. at 318.

Likewise, it is generally held that prior false claims by a witness, even if they did not involve the defendant or issues on trial, are proper subjects of cross because they reveal a highly relevant form of corruption. 2 Wigmore § 340, at 241, § 342 (3d ed. 1940); 3A Wigmore § 963, at 808 (Chadbourne rev. 1970); Mulligan v. State, 18 Md. App. 588 (Md. Ct. Spec. App. 1973); Johnson v. Richards, 50 Idaho 150, 294 Pac. 507 (1930); State v. Poston, 199 Iowa 1073, 203 N.W. 257 (1925).

Lipsky's Yellowfinger testimony falls squarely within Wigmore's principle that "the recurrence of false claims of a similar sort tends to negative good faith in the present claim, and thus to show an intent to make a false claim." 2 Wigmore § 340, at 241 (3d ed. 1940). See also United States v. D'Agostino, 338 F. 2d 490 (2d Cir. 1964).

B. The Court erroneously precluded the defense from eliciting from Lipsky that his prior perjury in Pacelli II was elicited with the full knowledge of the prosecutor or even that he personally heard the prosecutor grant him the immunity of which he subsequently denied any knowledge.

On April 11, 1972, Assistant United States Attorney Gerald Feffer, with Lipsky in his office, called Lipsky's attorney on the phone (A. 45). In Lipsky's presence, Feffer told Gwinn that "Barry Lipsky will never be tried" (A. 45), that "no matter what happens we...will not try Barry Lipsky I'm telling you that in the clear" (A. 46), "...I'm speaking from the head office here which has complete control in a case like this -- we

are not going to try Barry Lipsky and I hope you have your recorder on loud and clear." (A. 46) (Gwinn did). Lipsky then got on the phone and told Gwinn he heard every word of what was said (A. 47). Feffer returned to the phone and told Gwinn, "I can categorically state to you that any information that he gives as to this case or any other case that he makes he'll be used as a witness only and never be brought to trial for any information that comes out of his mouth this case or any other case." (A. 52). Gwinn replied "we're talking about a contract [of] complete transactional immunity is what you're saying" (A. 53). Feffer agreed, "Yeah, yeah, exactly..." (A. 53) Feffer then put Lipsky back on the phone with Gwinn (A. 54).

That very afternoon, Feffer took Lipsky before a grand jury and elicited testimony which resulted in Pacelli's indictment. He not only elicited from Lipsky a false understanding that anything he said could be used against him (A. 285), he had him testify that he understood the grand jury might indict him (Ex. 3566).[10]

But that was just prelude.[11] Barely two months later, in the trial of Pacelli II (72 CR. 664), Feffer asked and Lipsky answered the following questions:

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10 Lipsky not only heard everything Feffer said to Gwinn that day, Gwinn explained his complete transactional immunity to him, telling him he had Feffer's "unqualified promise that if you talk to the agents they would not indict you" and that he had Feffer's "word that they would not indict you" (A. 47); that they had a "verbal contract with the Government" (A. 52). Gwinn then told Feffer that he had explained it to Lipsky (A. 52).

11 Lipsky knew that this testimony was § 3500 material (A. 298) and, by inference, that he was covering up his deal by this testimony. So, of course, did Mr. Feffer.

Q. Mr. Lipsky, have any promises of any type been made to you from any governmental authority, federal, state, local, with respect to your testimony here in court today?

A. On this case, sir?

Q. Yes.

A. None whatsoever, sir. Nothing whatsoever has been promised or told to me in any way whatsoever at all.

Q. Can you tell the court and jury why you are testifying here today?

* * * * *

A. I do not expect to receive any favorable treatment for doing what I have done, by testifying here...

In summation, Mr. Feffer argued the truth of this testimony to the jury and said Lipsky "most assuredly deserves to be punished for dealing in narcotics" (A. 58).

At the prosecution's request, Judge Stewart prohibited the defense at the outset of trial from bringing out any of this (T. 66). The prosecution on direct simply elicited from Lipsky that on prior occasions as a witness he gave testimony that was "false and incorrect" (A. 257). On cross, Lipsky first admitted that he lied at the prior trials (A. 283),[12] then claimed it "was inaccurate testimony. I did not deliberately have the intention to lie" (A. 310). He then gave a windy explanation the purport of which was that the lawyers confused him (A. 313). On redirect, the Government then elicited from him his further labelling of the prior testimony as an "unintentional foul-up" (A. 655), and the prosecutor himself characterized it as "inaccurate testimony" (A. 691).

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12 Lipsky's perjury was equally blatant in the trial of Pacelli III (A. 60).

During cross, the defense had again sought permission to bring out through Lipsky that Feffer promised him immunity, then took him before the grand jury, then elicited his testimony in Pacelli II (A. 605). The court adhered to its earlier ruling (A. 609). The result was that the defense was never even able to prove that Lipsky heard the Government promise him immunity while denying it under oath. All that the jury was permitted to hear was that Lipsky's lawyer told him he had immunity (A. 291) and that Lipsky had denied having any understandings himself with the Government (A. 299).

What the defense was seeking to prove was not merely that a federal prosecutor suborned Lipsky's perjury in a prior prosecution of Pacelli, although if this had been all there was to it, it would clearly be relevant.[13] The defense was entitled to establish Feffer's role in the immunity deal and in eliciting the false testimony if for no other reason than to nail down that Lipsky committed blatant perjury. He could not have been "confused" by the questions in Pacelli II because they were asked of him by the very representative of the Government who gave him immunity. It was the same prosecutor with whom Lipsky had an understanding that asked him about his understanding in Pacelli II. Had the jury been permitted to hear that, together with the promises actually made by Feffer, it could only have concluded that Lipsky perjured himself in the prior trials and that his present claims about confusion, foul-ups, and inaccurracies were

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13 And easily distinguishable from United States v. Sperling, 506 F. 2d 1323, 1332 (n. 11) (2d Cir. 1974) where the Court upheld Judge Pollack's rejection of Sperling's bald offer of the tapes. It is worth noting, moreover, that subsequent to Sperling, in United States v. Mallah, Judge Pollack admitted all the testimony on this point which Judge Stewart rejected below. (See Appellant Pacelli's brief in 74-1327, pp. 2-3).

themselves nothing short of perjurious.[14] Thus, in foreclosing the defense from putting the facts before the jury, the court precluded proof, through Lipsky's own admissions, that he committed willful, deliberate, premeditated[15] perjury in two prior cases in which Pacelli was the defendant.[16]

The court's orders also effectively foreclosed proof that Lipsky had in fact been promised immunity by the very office now offering him as a witness. As the court said in Farkas v. United States, 2 F. 2d 644 (6th Cir. 1924);

> "Concededly, promises of immunity are admissible... Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witness, the relevant evidence is not alone the acts of attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind."

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14 This Court was satisfied on the matter: "The letter [to Morvillo] contains a blatant lie to the effect that his perjury...had been unintentional rather than deliberate," United States v. Pacelli, supra, at 1119, but the jury below did not have facts this Court had.

15 The premeditated character of the perjury is borne out not only by Feffer's role in it, and the grand jury testimony, but by Feffer's suggestion to Gwinn that the office wanted Lipsky to falsely appear as a real defendant in the forthcoming trial (A. 40). As Feffer candidly put it to Gwinn (which Lipsky heard), "It makes it a lot more difficult for us...to give immunity to a guy and then put him on in a one on one situation and try to convince the jury -- especially someone like him -- that he's, that he's telling the truth." (A. 41).

Lest the point be missed on Lipsky, Gwinn, after a meeting with the head of the Criminal Division and two other assistants, reported to Lipsky in a letter (D. Ex. D id.) on June 1, a few weeks before Pacelli II, that the Government was "anxious that you would be able to say that the Government has never told you anything when you testify" (A. 97).

16 Pacelli's status as a defendant in the prior cases was not established because the inability of the defense to prove the perjury removed any gain to the defense from bringing out Pacelli's previous target status.

Beyond this obvious relevance, however, the evidence had other equally cogent qualities, which were made plain to the trial judge:

> "Your Honor, there is no doubt that Mr. Lipsky had talked to federal agents, Mr. Lipsky has already testified, federal agents concerning the murder of Patsy Parks before April 11th, and it was anticipated he would continue to talk to the Government concerning the murder of Patsy Parks, and I believe we can also prove out of Lipsky's mouth that Mr. Feffer began working closely with Lipsky and interrogating him periodically in early April of 1972, and that that continued up through the balance of 1972, and that on numerous occasions the two of them conversed about the murder of Patsy Parks.
>
> Now, the relevance of it, your Honor, is twofold. Lipsky's story has changed in some particulars since, substantial particulars, since he testified in Nassau -- since he gave the statements in Nassau County and it has changed -- it changed during the period in which, as he refers to it, Mr. Feffer, his friend, was giving him TV sets, et cetera, et cetera, making those promises to him and talking to him about a federal prosecution of Pacelli.
>
> Now, the relevance of it is the effect on Lipsky's state of mind, the second aspect of the relevance of it. He is sitting there on that stand and he knows that a federal prosecutor in this office knowingly elicited perjury from him before the grand jury and in that first trial, that is, the June 1972 trial. He knows that that happened and he knows that he hasn't been punished for it, and he knows that that federal prosecutor hasn't been punished for it, and it seems to me that he could very logically infer from that that his interest lies in telling -- in saying what he thinks the prosecutors want him to say, and that whether it's true or false is of no importance, and I think our cases clearly show that we are entitled to elicit that evidence."(A. 615) [17]

Feffer was one of the first federal prosecutors to deal with Lipsky. They worked closely together, and Lipsky at least considered them good friends (G. Ex. 3572). It was while this relationship was developing that Lipsky changed his story about the Parks murder and began to claim he worked for Pacelli in the narcotics business. It was also apparently during that relationship that Lipsky decided to put Al and Ida Bracer and Barbara Jalaba in Pacelli's apartment on February 4th. Given the fact,

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17 See also the defendant's memo on the matter (A. 90).

which the jury was not, that Feffer elicited the Yellowfingers story from Lipsky in Pacelli II, given the fact that Feffer made a deal with Lipsky and then had him deny it under oath, the nature of that relationship was of vital importance in assessing the truth of Lipsky's story. If a prosecutor tells a witness to lie, it is surely a per se violation of Due Process and the right of confrontation to preclude the defense from eliciting it. What happened here, at least as it affected Lipsky's mind, was precisely that. By making a solemn promise of no prosecution to Lipsky, having him deny it in the grand jury, then asking him in a trial, "have any promises of any type been made to you from any governmental authority, federal, state or local, with respect to your testimony here in court today?" (A. 58), Feffer virtually told Lipsky to lie.[18]

Whether Feffer intended for Lipsky to lie is not determinative. Lipsky plainly so understood the course of events. As a unanimous Supreme Court held in Gordon v. United States, 344 U.S. 414 (1952) (reversing for exclusion of statements made by a judge in another case to the present prosecuting witness):

> "The question for [the jury] is not what the judge intended by the admonition, nor how we, or even they, construe its meaning. ...But the question for the jury is what effect they think these words had on the mind and conduct of a prisoner whose plea of guilty put him in large measure in the hands of the speaker." Id. at 422.

In Gordon, a judge had merely suggested to the witness to-be that he cooperate with the authorities. The Court said "we imply no criticism of [what he said]." Ibid. It would be a weird criminal process, however, which held Gordon inapplicable because what Feffer said to Lipsky is not only relevant but also subject to "criticism." Here, as was said in

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18 and see note 15 supra.

Harris v. United States, 371 F. 2d 365, 367 (n. 1) (9th Cir. 1967), "If the information sought reflected adversely upon the credibility of the witness, the Government had no legitimate interest in suppressing it."

The defense in a criminal case, especially where the prosecution rests heavily on the testimony of one witness, is entitled to explore fully the relationship between the government and the witness. United States v. Wolfson, 437 F. 2d 862 (2d Cir. 1970) (error to preclude questions about correspondence between witness and the S.E.C.); United States v. Masino, 275 F. 2d 129, 132 (2d Cir. 1960); United States v. Padgent, 432 F. 2d 701, 704 (2d Cir. 1970). Surely if a witness' relationship with another witness is a proper subject of inquiry, Tla-Koo-Lel-Lee v. United States, 167 U.S. 274 (1897); McFarland v. United States, 174 F. 2d 538 (D.C. Cir. 1949), the defense cannot be precluded from full exploration of a witness' relationship with a prosecutor, including statements made to the witness by the prosecutor. For the defense is "entitled to explore the possibility that the witness may have been in some way influenced by suggestions or statements made by those who interivewed him." United States v. Standard Oil Co., 316 F. 2d 884, 892 (7th Cir. 1963); McConnell v. United States, 393 F. 2d 404, 406 (5th Cir. 1968).

Feffer's communications to Lipsky concerning immunity and other understandings was only the beginning of a proper line of inquiry which could well have produced an inference that Lipsky embellished his story about the Parks murder because he believed that Feffer wanted him to. Indeed that inference might have arisen merely from the fact that Feffer, in Lipsky's preparatory stage as a federal witness, virtually told Lipsky to lie about immunity. Lipsky was a self-proclaimed expert in the "truth game" (A. 30)

and could easily have inferred from his experience in Pacelli II that the aim of the game is to convict Vincent Pacelli, Jr. To foreclose any and all inquiry into the matter was prejudicial error.

C. The court improperly and prejudicially precluded any and all inquiry into the fact that, one month before the Parks murder, Lipsky suggested to an acquaintance that he "burn" two witnesses against him.

Lipsky paraded himself before the jury as nonviolent (A. 356) and claimed a passive role in the murder. The defense, however, was that Lipsky murdered Parks himself or in league with someone else. It was therefore vital to the defense to permit inquiries tending to undermine Lipsky's pose.

During cross, defense counsel made an offer of proof at side bar that Lipsky in January, 1972 suggested to Bruce Gordon that in connection with Gordon's illegal activity "that two witnesses be burned" (A. 652). Defense counsel indicated that Bruce Gordon himself had related that conversation to counsel during an interview and that it was made in the presence of Margie Jacklone (A. 653), Lipsky's girlfriend (A. 101) and narcotics partner (A. 491).

In response to the prosecutor's objection to the relevancy of this inquiry, defense counsel indicated that this statement was made one month before Patsy Parks was burned and related to Lipsky's claim that he "just went along and was afraid of Pacelli and did what he was told." (A. 653). The Court disallowed this line of questioning.

This proposed area of inquiry was plainly relevant and crucial to the defense and went directly to negate Lipsky's testimony that his involvement in the Park's murder was solely a product of fear of and orchestrated by Pacelli.

There can be little question that if Lipsky on one or more prior occasions was disposed to counsel that persons facing criminal prosecution "burn" the witnesses against them, this evidence is highly probative to show that a month later, he was likewise predisposed to act in this manner when personally confronted with the same situation. He was not simply a marionette being manipulated by someone else. Whether or not such a predisposition is a habit or custom and thus clearly admissible as such, see McCormick, Evidence § 195, at 462-65 (2d ed. 1972), it was plainly relevant and admissible as a generic threat, i.e., a prior design which "points towards a class of acts, however broad...." 1 Wigmore on Evidence § 106, at 539 (3d ed. 1940). This is all the more true given the unique nexus between Lipsky's suggestion to Gordon and what was done a month hence to Patsy Parks. It surely is a highly unusual method of solving legal problems to burn witnesses. Were Lipsky himself on trial for the Parks murder, his suggestion to Gordon would plainly be relevant to his guilt. It is analogous to a mask or a peculiar modus operandi, sufficiently unique to be probative of identity even when pregnant with prejudice to a defendant. See generally, McCormick, supra § 190, at 449. It would also be probative of a larger plan or scheme of which the killing of Parks was arguably only a part. Cf. State v. Yoshimo, 45 Hawaii 206, 364 P. 2d 638 (1961); Haley v. State, 84 Tex. Cr. 629, 209 S.W. 675 (1919); McCormick, supra, § 190, at 448. Indeed, its nature and probative power against Lipsky is virtually identical to the prosecution's evidence against Pacelli below, through Lipsky, that some time after the murder of Parks, Pacelli said to an associate that if Frankie doesn't get out of town, "he is going to get the same thing that happened to the girl" (A. 248).

The relevance of both statements is not to prove that the statement of design actually transpired but to show a unique state of mind pointing toward the speaker as the killer.[19]

Thus, had Lipsky been on trial, his statement to Gordon and Jacklone would have been admissible as part of the prosecution's case in chief, notwithstanding its prejudicial potential. Here, however, it had doubled relevance because it cogently impeached Lipsky's testimony.

Where, as here, the defense claims the witness himself committed the crime and is trying to shift the blame to the defendant, the widest possible latitude is required in cross-examination, and preclusion of full inquiry into matters tending to establish the witness' guilt "calls into question the ultimate integrity of the fact-finding process." Chambers v. Mississippi, 410 U.S. 284, 295 (1972).

Even if the propriety of the proposed inquiry were not so palpable, its admissibility was determined by the law of the case. In the first trial, the prosecutor was permitted over objection to ask Pacelli if he ever said that if anybody double-crossed him, "he would shoot their knee-caps off." Despite the gross dissimilarity between the statement and the alleged facts of the Parks murder, despite the failure to locate the statement in time and circumstance, despite the prosecution's failure to disclose to the court the basis for the question, and despite its prejudicial character, this Court held that the cross-examination:

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19 And, of course, Lipsky's statement did not stand alone. When combined with the evidence that Parks may have been a potential witness against Lipsky or his close friend Fabre, that Fabre was strangely unavailable for this trial; with the evidence of Lipsky's preoccupation with horrible, gruesome activities, and, despite his protestations, his proclivity toward violence, the statement to Gordon might well have produced an acquittal.

> "While presenting a closer question, may well have been justified as evidence of a gereric threat bearing on the issue of intent to prevent Parks from testifying against him, see I Wigmore § 102 (3d ed. 1940); United States v. Annunziato, 293 F. 2d 373, 377 (2d Cir.), cert denied, 368 U.S. 919 (1961), provided the government had 'support for the question,' cf. United States v. Haskell, 327 F. 2d 281, 284 (2d Cir.), cert denied, 377 U.S. 945 (1944), which it represents that it did."

United States v. Pacelli, 491 F. 2d 1108, 1120 (2d Cir. 1974).

Here, defense counsel not only represented that he had support for the question, but gave names, dates and sources (A. 653) and could have called as a witness the person to whom the statement was made.[20] Counsel also indicated that the statement was made in the presence of a third person, Marge Jacklone.

Whatever burden is placed on defense counsel in the cross-examination of the principal government witness and alleged accomplice, counsel clearly and convincingly demonstrated "support for the question." United States v. Haskell, supra.

To hold that the defendant charged with stabbing and burning a witness may be questioned about vague, unspecific, possibly remote statements about shooting kneecaps, yet totally preclude the defense from questioning the alleged accomplice about the matter in issue raises the gravest of questions concerning the fairness and integrity of the process.

* * * * *

When an alleged accomplice is testifying against a defendant, especially broad latitude in cross-examination must be permitted. United States v. Gordon, 344 U.S. 414 (1953); United States v. Padgent, 432 F. 2d 701, 705 (2d Cir. 1970) ("inherently suspect"); Sandroff v. United States, 158 F. 2d 623 (6th Cir. 1956).

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20 Bruce Gordon was in the courtroom during part of the trial (T. 1019-20).

Where, in addition, the witness' testimony comprises almost the whole of the prosecution's case, the court "must...scrutinize any claimed error with extreme care." United States v. Persico, 305 F. 2d 534, 536 (2d Cir. 1962), citing Glasser v. United States, 315 U.S. 60, 67 (1942).

The right of cross-examination is particularly important where the accused claims the witness is himself the murderer and cannot be frittered away by "narrow and unrealistic rules of evidence." Chambers v. Mississippi, 410 U.S. 284, 298 (1973).

Moreover while

> "rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of witnesses, are not reversible errors, ...the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate and particularly in circumstances where the excluded questions have a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, pass the proper limits of discretion and is reversible error."

District of Columbia v. Clawans, 300 U.S. 617, 632 (1937).

Each and every one of these principles was violated by the court below on all three occasions. Reversal is plainly required.

II

THE COURT ERRED IN REFUSING TO PERMIT A PSYCHIATRIC EXAMINATION OF BARRY LIPSKY.

By pre-trial motion, the defense requested the court to order a psychiatric examination of Lipsky (A. 13).[21] In an affidavit in support thereof, the defense detailed Lipsky's claimed involvement in the brutal and bizarre Parks murder, his traumatic incarceration under difficult conditions (A. 16-17), attempts by his mother, prior to the murder, to send him to a psychiatrist (A.15), wierd behavior sworn to by his attorney in a successful effort to obtain a competency examination (A. 19), The attorney's sworn opinion, based upon personal observations that Lipsky "could not adequately testify on his own behalf...." (A. 19).

In addition, the defendant pointed out that Lipsky had in fact once visited a psychiatrist (A. 16), admitted to banging his hand against a wall, was particularly fond of horror programs and even adopted the name, "Mr. Graves", of a personality on one of his favorite shows (A. 16). The defense included as an exhibit Lipsky's letter to Marvillo (wherein he admits to a "terrible mental state," manifested paranoia about his lawyer and pronounced dependence upon the Government (A. 16).[22]

The defense pointed out to the court Lipsky's lengthy use of cocaine (A. 22), and included the opinions of two attorneys well acquainted with

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21 A related motion was made to disqualify Lipsky as a witness (A. 57).

22 See the Courts' discussion of the implications of this letter re Lipsky's mental illness in United States v. Pacelli, 491 F 2d 1108, 1119 (2d Cir. 1974).

Lipsky, Feffer and Gwinn. From the ubiquitous tapes the following was culled:

> These transcripts reflect a conversation on March 13, 1972, concerning Lipsky's mental stability and sanity. Gwinn told Feffer he had "intended to have him [Lipsky] examined by a whole battery of psychologists ....," and that he knew "that there's something wrong with him. I do not know that he is beastly insane." Feffer replied, "yea, he [the Nassau County District Attorney] can't use a screwball." Gwinn: "He can't use a screwball. On the other hand, if [the Nassau County District Attorney] doesn't want to use him, I may have to have a screwball defended." (Transcript, pages 2-3.) Later in the conversation, Gwinn refers to his client Lipsky as "a dummy" and "weird" (p. 5). Subsequently, on May 23, 1972, the subject was renewed. Gwinn said that Lipsky was becoming "edgy" and Feffer agreed, saying "it's more noticeable." Gwinn said he was concerned about Lipsky's "emotional stability" and Feffer agreed. Gwinn added that Lipsky was "capable of going crazy as hell ..... If he's gonna be any good, he's got to be competent" (pp. 38-39). (A. 15).

In opposition, the Government simply relied upon the report of two state court-appointed psychiatrists, in December, 1972, finding Lipsky capable of "[understanding] the charges against him, [consulting] with his lawyer in his defense [and cooperating] in courtroom procedure" (A. 37). The court denied the defense request.

During cross-examination, the motion was renewed in reliance upon the new information developed on cross, newly available documentation, and the opinion of a psychiatrist:

> I advise the court that we have had a distinguished psychiatrist in the courtroom during all of Lipsky's testimony, and that not only the testimony elicited, but Lipsky's demeanor clearly indicates that -- and I will be happy to put in the affidavits in suport of it -- that the pre-trial motion did not come close to suggesting the seriousness of this man's mental condition. Our preliminary and very tentative discussions with our psychiatrist suggest that in his opinion Mr. Lipsky is a psychopath, a pathological liar, an egomaniac, and he, for example, would very much like to explore with Lipsky his nightmares and the nature of his nightmares that are referred to in the psychiatric report of the doctors in Nassau County. The court has ruled out my questions along those lines. It seems to me that the case is about as compelling as a case could be given the fact, if it is a fact, lipsky has testified that he has not seen a psychiatrist since December of

> 1972. It seems to me just overwhelming that a psychiatric examination is needed in this case to determine whether this man is capable of telling the truth, and that would go not only to his credibility, but to his competence.
>
> THE COURT: I have done a little on this and a little research and it seems to me that you have not made out a good enough case. I am going to deny your motion (A. 629-30).

Among the newly developed indications of Lipsky's serious mental illness were: Lipsky's letters describing himself and his disturbed mental state (A. 30, 391), his attorney's letters to various persons describing Lipsky as a "mentally disturbed man" needing help "in keeping what sanity he has" (A. 25), and as "mentally deteriorating very rapidly" (A. 27, 29);[23] jail and prison records indicating heavy recent dosages of Dalmane (Flurazepam) and Valium (A. 31-4,77); Lipsky's admissions that when he snorted cocaine, "on almost a daily basis" beginning in 1967 (A. 393) he sometimes took it twenty times a day (A. 395); that he currently takes Flurazepam (A. 263) and Valium (A. 264), and banged his hand against the wall and cried in the witness room during the trial (A. 398).

There is no doubt of the court's authority to order a mental examination of a prospective prosecution witness. Carrado v. United States, 210 F. 2d 712, 721 (D.C. Cir. 1954); United States v. Butler, 481 F. 2d 531 (D.C. Cir. 1973). Cf. United States V. Baird, 414 F 2d 700 (2d Cir. 1969). As stated in the leading case on the subject, a court has inherent power to order such a pre-trial examination on the question of competency or credibility, and such an order should be granted where there is reasonable doubt as to the capacity or credibility of the witness. State v. Butler, 27 N.J. 560, 143 A. 2d 530 (1958). Such orders "should be executed only

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23 These letters, along with Gwinn's affidavit describing Lipsky's mental illness were offered in evidence by the defense but excluded by the court (A. 635-7).

upon a substantial showing of need and justification', 143 A. 2d at 556.

In Butler, the trial court was reversed for having refused defendant's request to submit a prosecution witness to a psychiatric examination.

The showing of need was far less in Butler than it was here. The witness was there challenged solely on a hospital report which diagnosed the witness as not psychotic but "functioning within a moderate defective range of intelligence, that he is an anxious and insecure individual who tries to avoid all difficult life situations, that when confronted with unavoidable difficulties he may try to bluff through them or become panic stricken and respond with a gross emotional outburst resembling a temper tantrum" Id. at 552.

Apart from the differences in intelligence, the description applies to Lipsky.

As Butler held, a psychiatric examination may be required not only where competency is in question, but to develop evidence on credibility as well. As succinctly put by the District of Columbia Circuit:

> "To assist the court in making its competency decision, to aid the jury in assessing credibility, or to serve both purposes, the trial judge may order a psychiatric examination to obtain expert testimony concerning the degree and effect of a witness' disability." United States v. Benn, 476 F. 2d 1127, 1130 (D.C. Cir. 1973):

It is thus clear that a prima facie showing of incompetency is not necessary to warrant an examination. It should be enough that evidence exists which would cast some doubt upon either credibility or competency,

and it appears likely that a psychiatric evaluation would be useful in the search for truth.[24]

The fact that Lipsky was found competent to stand trial in 1972, after a brief examination by two doctors whose qualifications are untested and motivations unknown is virtually irrelevant. One can certainly be competent to stand trial[25] without being a competent witness.[26] One can be competent as a witness in 1972 and be a pathological liar in 1975 or 1972.

Furthermore, according to the reports, there was no undertaking to determine mental illness or psycopathy, nor any inquiry into the facts surrounding the offense (A. 37). Lipsky himself described the examination:

> "for about one and one half hours two old men .. asked me a lot of stupid questions. They called this a 'competency examination' .

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24 See generally supporting liberal pre-trial psychiatric examination of dubious prosecution witnesses: Conrad, Mental Examination of Witnesses, 11 Syracuse L. Rev. 149 (1960); Weihoffen, Testimonial Competence and Credibility, 34 Geo Wash. L. Rev. 53, 75 (1965); Slovenko, Witnesses, Psychiatry and the Credibility of Testimony, 19 U. of Fla. L. Rev. 1 (1966); Comment, 59 Yale L. J. 1324 (1950); Comment, 9 Rutgers L. Rev. 330 (1958); Anno, Psychiatric Examination of Complaining Witness, 18 A.L.R. 2d 1433.

25 The accused is competent to stand trial if he can "consult with his lawyer with a reasonable degree of rational understanding [and] has a rational as well as factual understanding of the proceedings against him" Dusky v. United States, 362 U.S. 402 (1960).

26 Competency to be a witness requires capacity to observe, remember and relate, and an understanding of the oath. Doron v. United States, 205 F. 2d 717, 718 (D.C. Cir. 1953). But the understanding of the oath clearly requires "a sense of moral responsibility of the duty to make the narration correspond to the recollection and knowledge, i.e. to speak the truth as he sees it" 2 Wigmore §495 (3d ed. 1940) (emph. in original).

> These two men were on the phone with the DA while I was in the room with them ... [It] was a complete farce" (A. 409).

To give that examination any weight in the present circumstances would be preposterous. It is analoguous to what happened in Butler: the prosecution had its own expertexamine the witness but opposed the defense motion. Said the New Jersey Supreme Court:

> "..... it is fundamentally unfair for one interested party to obtain an examination by self selected experts and to oppose the granting of the same right or privilege to the other."

143 A. 2d at 553.

This court has noted the unfairness to the prosecution inherent in permitting a defendant to interpose a defense of insanity and at the same time preclude the Government from the benefit of a mental examination. Accordingly, a defendant who interposes such a defense may be required to submit to a government examination. United States v. Weiser, 428 F. 2d 932 (2d Cir. 1969). It is no less unfair to permit the government to hide behind a remote, essentially irrelevant, hearsay report,[27] put Lipsky forth as a competent credible witness and resist all efforts of the defendant to conduct a psychiatric examination.[28]

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27 Which the Government invited the defense to offer into evidence, in the presence of the jury (A. 383).

28 Lipsky refused to talk to the defense before trial. The Government not only opposed the defense motion to examine Lipsky, it objected, successfully, to testimony from the defense's expert (see infra). Finally, it objected to a question by the defense, put to Lipsky, "Are you willing to be interviewed by a psychiatrist," which the court improperly sustained (A. 653).

Whether the trial judge should order a witness to undergo a psychiatric examination involves a "balancing of the respective needs and dangers presented by the individual case." United States v. Butler, 481 F. 2d 531, 533 (D.C. Cir. 1973). They should not be ordered as a matter of course, as they may "impinge on a witness' right to privacy" and deter witnesses from coming forward. United States v. Benn 476 F. 2d 1127 (D.C. Cir. 1972). Surely, however, such considerations have no weight where Lipsky is concerned. He became a witness to escape a first degree murder charge in Nassau County. A weighty consideration in favor of such an order, on the other hand, is the seriousness of the charge. Note, 59 Yale L. J. 1354. Where, as here, the defendant's life is at stake, a very small showing of need should be required. State v. Butler, supra, at 553; Cf. Taborsky v. State, 116 A. 2d 433 (Conn. Sup. Ct. 1955). Also relevant, and in the same direction, is whether the witness, by reason of dependency on the Government or for other reasons is inherently suspect, United States v. Benn, supra; 3 Wigmore, Evidence § 924 (a) (3 ed. 1940), or appears to be a heavy part of the prosecution's case. Thus, in United States v. Butler, supra, the trial court's refusal to order an examination was affirmed "Largely in view of the substantial corroborative evidence introduced by the Government" 481 F. 2d at 535.

The facts arrayed in support of defendants motion, moreover, were simply overwhelming proof of Lipsky's adnormality and raised the gravest of doubts about his ability to respect the oath. The opinions of Lipsky's lawyer and of Feffer were plainly relevant on the issue. United States v. Butler, supra, 481 F. 2d at 536, as were Lipsky's own statements denying his mental health. Cf. United States v. Partin, 493 F. 2d 750 (5th Cir. 1974).

An additional showing of need was made. The court was informed that the defense had a distinguished psychiatric witness present who had suggested lines of inquiry to counsel which the court had precluded, and the psychiatrist had tentatively concluded that Lipsky was a psycopath, a pathological liar and an egomaniac, and that an examination of Lipsky would be very useful in his diagnosis. The defense offered to put this information in affidavit form (A. 629).

In his pre-trial motion, moreover, defendant had pointed out that Lipsky's lengthy use of cocaine was a matter of profound significance in assessing Lipsky's credibility, which no jury, without expert assistance, would be able to evaluate, and which an expert could best evaluate in connection with a psychiatric examination (A. 23-4).

Citing medical sources, the District of Columbia Circuit, in Hansford v. United States, 365 F. 2d 920, 922 (D.C. Cir. 1966), recently observed that:

> "Current medical knowledge indicates that use of narcotics often produces a psychological and physiological reaction known as an acute brain syndrome, which is a 'basic mental condition characteristic of diffuse impairment of brain tissue function.' The characteristic symptoms of the syndrome are impairment of orientation; impairment of memory; impairment of all intellectual functions including comprehension, calculation, knowledge and learning, impairment of judgment; and lability and shallowness of affect."

As to cocaine users in particular, it has been noted that:

> Prolonged and heavy cocaine use can produce severe psychological and physiological effects. One frequent psychological result is hallucinations. In some cases, prolonged use causes paranoid delusions. Some commentators claim that in these states of hyper-excitement and paranoia, the cocaine user is extremely dangerous and potentially violent. McLaughlin, Cocaine: The History and Regulation of a Dangerous Drug, 58 Cornell L. Q. 537, 551 (1973).

Still, as the court noted in Hansford, supra, 365 F. 2d at 923:

> "The effects of narcotic use will vary depending on the amount of drugs taken, the degree of tolerance developed by the individual, and the idiosycratic reaction of the person to the drugs. For this very reason, only by a hearing can it be determined whether any particular [person] is incompetent because of his use of drugs."

The defense was denied that hearing, and denied access or inquiry into the relationship of Lipsky's drug usage to his other mental disorders.[29]

Although there are professional disagreements about the perimeters of "psycopathy," that it is a "form of mental abnormality, however, is not doubted," Note, 10 Rutgers Law Review 425, 433 (1955). Lipsky appears clearly to have, in addition to other character disorders, all those features of psycopathy that derogate from his ability to understand the implications of an oath or to tell the truth, e.g., an

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29 With respect to Flurazepam (Dalmane), which Lipsky uses currently, apparently in combination with Valium, the Physicians Desk Reference (1973) says at 1217:

> "Patients should be cautioned about possible combined effect with alcohol or other CNS depressants."
>
> *
>
> "Dalmane is a hypnotic agent."
>
> *
>
> "...as with any hypnotic, caution must be exercised in administering Dalmane to individuals known to be addiction prone or those whose history suggests they may increase the dosage on their own initiative..."
>
> *
>
> "If Dalmane (flurazepam hydrochloride) is to be combined with other drugs having known hypnotic properties [e.g., Valium] or CNS-depressant effects, due consideration should be given to potential addictive effects."
>
> *
>
> "Adverse reactions to Dalmane include "Anorexia, euphoria, depression ...confusion, restlessness, hallucinations..."

"apparent absence of common moral and ethical sensibility, or the ability to make a fundamental distinction between what is right and what is wrong...indifference to social demands and unawareness of social responsibilities; flagrant disregard of the needs and rights of other people; excessive selfishness and overweening egocentricity; failures in attempts at adaptation; ...instability, shiftlessness, etc. ...[absence] of power to perceive even elementary distinctions between good and evil."

Thornton, The Relation Between Crime and Psycopathic Personality (1952).

As though writing about Lipsky, Henry Weihofen said:

"Sociopathic personality disturbance, formerly (and frequently still today)called psychopathic personality, is a broad term covering an ill-defined category of persons. It can have a material effect on credibility. Although capacity to observe and recollect is apparently unimpaired, the sense of moral responsibility to narrate truthfully may be affected. This may render the witness careless with the truth, impulsive, and undependable. Because he is so utterly devoid of any sense of guilt, he feels justified in telling all sorts of lies to escape the consequences of his acts.

The sociopath may harbor unconscious hostilities that lead to false accusations or biased testimony. He may crave the publicity that his accusations give him or, driven by unconscious motives, may indulge in repetitious lying which is wholly irrational and without any discernable end. He may appear normal, mild-mannered, and intelligent. His lies, indeed, are often told with more conviction than normal persons show. Even when his lying is exposed, he is able to make quick adjustments and thoroughly mislead the layman. Even the psychiatric expert has the greatest difficulty in recognizing the existence of the condition or assessing the person's credibility." Weihofen,

Testimonial Competence and Credibility, 34 Geo. Wash. L. Rev. 53, 86 (1965).

He also notes, quite correctly:

"Even though admissible, opinions based either on mere observations of courtroom behavior or on hypothetical questions are likely to be denigrated or even ridiculed by the other side as wholly inadequate or even unethical. A well-founded opinion should rest on a full clinical examination." Id. at 69.

Lipsky was literally a captive of the Government. His mind was a storehouse of information probative of both his competence and his credibility. To deny the defense access to this evidence on the showing made here was a deprivation of Due Process. Cf. Washington v. Texas, 388 U.S. 14, 19 (1967).

III.

THE COURT ERRED IN EXCLUDING ALL TESTIMONY BY THE DEFENSE PSYCHIATRIST.

Out of the presence of the jury, the defense called Dr. David Abrahamsen to the stand for an offer of proof (A. 732). Dr. Abrahamsen's qualifications are already known to this Court, as he was the Government's witness in at least two important appeals concerning psychiatric testimony. United States v. Baird, 414 F. 2d 700 (2d Cir. 1969); United States v. Weiser, 428 F. 2d 932 (2d Cir. 1969).[30] Employed as an expert witness by the Department of Justice some twenty times (A. 742), Dr. Abrahamsen is the author of about ten books on crime and psychiatry, including Crime and the Human Mind, Who are the Guilty: A Study of Education and Crime, The Psychology of Crime, The Murdering Mind (A. 742) and some 25 to 30 articles on the subject (A. 743). Dr. Abrahamsen prepared for his testimony by observing Lipsky during his entire testimony (A. 749), studying a transcript of that testimony (A. 745) and a number of Lipsky's letters (A. 743), medical records (A. 31, 35, 77) probation reports (A. 63), medical and family histories (A. 79). On the basis of all these, he concluded to a reasonable medical certainty that Lipsky is "mentally ill," (A. 749) a "psychopathic personality" (A. 751), a "very sick man" (A. 759), "mentally diseased" (A. 821), with a "character disorder," (A. 823). Lipsky lacks a normal ability to distinguish reality, is self-serving, highly egocentric and narcissistic, to whom truth is always secondary (A. 751). In a threatening situation, he "usually does everything in order to get out of this threatening situation" (A. 752), and has "extreme difficulty in

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30 He was also the Government's psychiatrist in United States v. Levy, 449 F. 2d 769 (2d Cir. 1971).

...trying to tell the truth" (A. 1142). Lipsky, and other psycopaths, lack normal moral compunctions and controls and the only rule he has is his own self-preservation (A. 752). He cannot take into account consideration of others (A. 755). It is impossible for him to tell the truth unless it perfectly coincides with his own interest (A. 759), as he perceives it, and he has a distorted perception of his own self interest (A. 761).

On the basis of the medical records, moreover, Dr. Abrahamsen concluded that Lipsky is still a drug addict (A. 763, 788), which itself is a verification of a serious underlying personality problem (A. 764); that the dosages of Valium and Dalmane given to Lipsky recently were very strong (A. 789), indicative of continued drug dependency (A. 789-90, 807-8). Lipsky is a pathological liar (A. 791).

Dr. Abrahamsen's opinions of Lipsky were based not only on the documents, but also upon Lipsky's demeanor and methods of answering questions (A. 767, 781-83) which revealed, inter alia, a highly selective memory (A. 767).

After an extensive cross by both the judge and the prosecutor, the court refused to permit the jury to hear any of the Doctor's testimony, on the ground it would be "of no use to the jury" (A. 845).

The judge so ruled despite the defense's pointing out that the jurors, in order to qualify to hear the case, had to swear they had no experience with drugs, and the doctor's testimony was essential to their understanding: (a) that Lipsky was drug-dependent, and (b) the relationship of that dependency to his credibility (A. 838-9).

As to the prosecutor's claim that the jury already knew Lipsky was looking out for his own interests, the defense pointed out that the jury had little or no experience with psycopaths like Lipsky and therefore could

not easily translate their sense of self interest into his distorted, perverted sense of self (A. 841-4).

It was prejudicial error to exclude all the doctor's testimony, and it was elevated into unconstitutionality when combined with the previous refusal to permit a psychiatric examination.

The Sixth Amendment affords the accused "the right...to have compulsory process for obtaining witnesses in his favor."

> "The right to offer the testimony of witnesses...is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutor's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process."

Washington v. Texas, 388 U.S. 14, 19 (1967); see also Chambers v. Mississippi, 410 U.S. 284 (1973); Webb v. Texas, 409 U.S. 95 (1972); In re Oliver, 333 U.S. 257 (1948); Giles v. Maryland, 386 U.S. 66 (1967).

In Washington v. Texas, the Supreme Court invalidated a Texas law excluding the testimony of persons charged as principals, accomplices or accessories in the same crime as witnesses for each other. The Court noted that the excluded witness' testimony in that case "would have been relevant and material, and...was vital to the defense." 388 U.S., at 16.[31]

Rule 702 of the Federal Rules of Evidence succinctly expresses the law on the matter:

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training, or education may testify thereto."

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31 See also, Western, The Compulsory Process Clause, 73 Mich. L. Rev. 73, 117 (1974).

It is clear beyond doubt that Dr. Abrahamsen's testimony met that standard. Mental disorders are so peculiarly the subject of expertise, that lay opinion on the matter is often denigrated or even excluded.[32] As Weihofen notes:

> "The existence of the mental illness may not be apparent to a judge or a jury. The witness may appear entirely lucid and be mentally alert and highly articulate, but he may be suffering from a deep-seated personality disturbance. Even if such disturbance were proved, that standing alone would not tell the jury whether or not it led to distortion in his interpretation of narration of what happened. Mental illness and its effect on capacity to observe, recollect, and communicate, therefore, often calls for psychiatric experts." Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash. L. Rev. 53, 67 (1965).

It is simply absurd to suggest that a group of laymen can understand and evaluate the psycho-dynamics of a man like Lipsky not only as well as a specialized, experienced, distinguished psychiatrist like Dr. Abrahamsen, but that Dr. Abrahamsen's findings and observations are not even "helpful" in that regard. Such reasoning would exclude expert psychiatric evidence in every case, including those raising defenses of insanity.

Courtroom observation alone was held sufficient foundation for expert psychiatric testimony on credibility a quarter-century ago. United States v. Hiss, 88 F. Supp. 559 (SDNY 1950) affd., 185 F. 2d 822 (2d Cir. 1950), cert. den., 340 U.S. 948 (1951), and the principle of Hiss has been approved on numerous occasions, e.g., Taborsky v. State, 95 A. 2d 59 (Conn. 1953); Anderson v. United States, 237 F. 2d 118 (9th Cir. 1958). Cf. United States v. Daileda, 229 F. Supp. 148, 154 (M.D.Pa. 1964). Such testimony "has been widely received by the courts." McCormick, Evidence § 45, at 95 (2d ed. 1970). "Undoubtedly, if there is ground for believing that a principle witness is

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32 As it was below. See note 23 supra.

subject to some mental abnormality that may effect his credibility, a need for employment of the resources of psychiatry exist[s]." Id. at 96.

As to objections about "invading the province of the jury" and the like

> None of these objections seems sound... [T]he question of a witness's credibility is always open, especially when the outcome of the case depends on the testimony of a single or key witness.... That the court has found the witness to possess the minimal degree of capacity to testify should not foreclose a showing that because of mental defect or disorder his testimony is so untrustworthy that it should be given little weight. Some disordered persons, such as the psychopathic liars, may be so convincing that they can easily pass the test of competency; but it would be unjust to deny the other party the opportunity to show the existence of the condition and its effect upon reliability of testimony. Because modern practice admits as competent to testify persons proved or conceded to be mentally ill to some degree, a liberal admission policy for evidence on the effect of mental conditions upon credibility is needed.

Weihofen, supra, at 68.

Where, as here, the defense expert has done everything possible to get a full and accurate evaluation of the witness, has a complete biographical and medical history of the witness, studies his correspondence, his testimony, and observes him testifying for two and a half days, it is the court which invades the province of the jury when any and all testimony from the expert is excluded.

It would set back the course of enlightenment in criminal justice at least fifty years to affirm the decision below.

IV.

THE COURT SHOULD HAVE DIRECTED A JUDGMENT OF ACQUITTAL ON COUNT 1.

Count 1, upon which Pacelli received the life sentence, charged a violation of 18 U.S.C. § 241, which makes criminal a conspiracy to "injure...any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

On the first appeal, defendant argued, inter alia, that there was no "right", in the ordinary sense of the word, to be a federal witness, constitutional or statutory, and his conviction on count 1 was therefore illegal. This court rejected the argument, 491 F. 2d 1108, 1113, and it will not be restated here, other than to preserve the point.[33]

Assuming arguendo, that notwithstanding the fact that a citizen has no legally enforceable right to be a witness in a federal case, interference with that nonexistent right is nonetheless an abridgment of the "free exercise or enjoyment of any right or privilege secured to him by the...laws of the United States" because, as this court held, one has a "right" to do something which one has no right, but merely an obligation to do, 491 F. 2d at 1113, the Government still proved no violation of § 241

A. Novel extension of § 241.

Although § 241 in essentially its present form was enacted more than a century ago, defendant was the first person ever to be convicted under it for killing a prospective witness, and no court had ever held that interference with an unwilling, non-litigant witness violated § 241. Quite

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33 Should the Court be amenable to reconsidering the issue, appellant adopts the arguments he then made. See Appellant's Supplemental Brief, 73-2137.

to the contrary, it was expressly held in 1891 by Mr. Justice Lamar, on circuit, that § 241 did not apply to a grand jury witness; the applicable criminal statute for interference with witnesses was the predecessor of § 1503 (count 2 in this case). United States v. Sanges, 48 Fed. 78 (C.C. Ga. 1891), writ of error dismissed, 144 U.S. 310 (1892).

When Congress clarified the Civil Rights Acts in 1968 by specifying a long list of protected rights in 18 U.S.C. § 245, and declining to include therein a proffered amendment specifically covering the right to be a witness,[34] it certainly did nothing to upset the holding of Sanges.

Thus, whether a prospective but unwilling witness has a "right," as that word is used in § 241, has at best been extremely unclear for a century and the 1968 amendments did not make the situation any clearer.

Whether or not there are logical peregrinations which can satisfy this Court, after 100 years under the statute, that Patsy Parks had a federal "right," the "free exercise" of which she was seeking to "enjoy," they would be less than obvious to many lawyers, much less to the citizenry.

Screws v. United States, 325 U.S. 91, 105 (1945), to preserve § 241[35] from unconstitutional vagueness, construed it as inapplicable to anything other than a conspiracy the specific purpose of which was to deprive a citizen of "a federal right made definite by decision or other rule of law." It cannot possibly be said that this test was satisfied by the present prosecution.

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34 See id. at p. 12.

35 Actually it was 18 U.S.C. § 242, but the decision is equally applicable to § 241. See United States v. Guest, 383 U.S. 745, 753 785-86 (1966); United States v. Williams, 341 U.S. 70, 93-95 (1951) (Douglas, J., dissenting).

Moreover, this court has just recently reaffirmed the principle that § 241 does not go as far as its words literally suggest. Thus § 241 was held inapplicable to wilful interference with rights expressly secured by federal labor laws. United States v. DeLaurentis, 491 F. 2d 208 (2d Cir. 1974). See also, United States v. Berke Cake Co., 50 F. Supp. 311 (E.D.N.Y. 1943). This court held that § 241 was not to be extended so as to aggravate the punishment for conduct less severely penalized by another, specific statute.

In this case, harming a witness is specifically penalized under § 1503, far less severely than was attempted here by a novel extension of § 241. DeLaurentis will not permit the statute to be used for such a purpose.

B. Knowledge of the victim's status as a citizen.

Furthermore, and this is an entirely different but wholly sufficient ground for acquittal on count 1, there was no evidence that the alleged co-conspirators knew that Parks was a citizen. The citizenship of a victim is an element of the offense under § 241. If the victim is not a citizen, there can be no offense. Baldwin v. Franks, 120 U.S. 678, 690 (1887). Knowledge of that status obviously must be proved. Cf. Morrison v. California, 291 U.S. 82, 92-93 (1933); United States v. Mack, 112 F. 2d 290 (2d Cir. 1940). Recognizing this, the prosecutor below tried to elicit from Lipsky that he heard Parks and Pacelli talking about passports. Lipsky, however, said "I don't remember it." (A. 216). There was a failure of proof as to this element.

C. Shared specific intent.

Finally, unless both of two alleged co-conspirators are guilty, neither can be. Feder v. United States, 257 F. 694 (2d Cir. 1919).

Section 241, per Screws, requires a "specific intent" to take away a "definite" right. Section 241 can only be violated by conspirators who share an awareness that "what [they do] is precisely what the statute forbids." 325 U.S. at 103-4. Cf. United States v. Shafer, 384 F. Supp. 496 (N.D. Ohio 1974) (§ 242). There is no evidence from which the jury could have found that Lipsky knew Parks was to be killed for that reason. If he did not, then he was not guilty of violating § 241. Screws, supra; Guest, supra. And if Lipsky was not guilty, neither was Pacelli, for the charge is conspiracy and no one can conspire with himself. Feder, supra.

Moreover, unless the primary purpose of both Lipsky and Pacelli was to prevent Parks from testifying in the forthcoming trial, and that meeting of minds and purposes occurred in the Southern District, there was no offense. United States v. Gallishaw, 428 F. 2d 760 (2d Cir. 1970).

No offense was established under count 1 and the court should have granted defendant's motion for acquittal.

V.

THE JUDGE ABUSED HIS SENTENCING DISCRETION.

The sentencing of Vincent Pacelli, Jr. on Count 1 to a maximum life term of imprisonment consecutive to the 35 years he was serving for two narcotics convictions was the harshest punishment that the court below could have imposed.[36] With the consecutive life term, he is not even eligible for parole for over 26 1/2 years -- until he is 58 years old.[37] Moreover, defendant was not sentenced pursuant to 18 U.S.C. § 4208(a)(2), making him eligible for parole at the Parole Board's discretion, and was therefore barred from consideration for release under parole supervision for 15 additional years even if his prison rehabilitation merited such consideration.[38] See United States v. Slutsky, Nos. 72-2004, 72-2041 (2d Cir. April 18, 1975); Garafola v. Benson, 505 F. 2d 1212, 1217-18 (7th Cir. 1974).

Sending a man to prison for at least a quarter century -- and perhaps for as long as 80 years -- is a momentous decision. "We scarcely need to be reminded that sentencing has a tremendous and far-reaching impact on the

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36 The trial court also imposed the maximum five-year imprisonment term on defendant for Count 2.

37 The sentence was imposed pursuant to 18 U.S.C. § 4202, which bars eligibility for parole until the prisoner has served one-third of his sentence or after serving 15 years of a life sentence. See also 28 C.F.R. § 2.2 (1974). Defendant's parole eligibility will be calculated on the basis of one-third of the aggregate 35 year terms (11 1/2 years) plus 15 years on the life term, yielding the 26 1/2 year minimum time period before eligibility arises.

38 Despite whatever growing dissatisfaction there may be with the "rehabilitative model," the Parole Board continues to emphasize such factors in assessing an inmate's parole prospects. See Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L. J. 810, 830 (1975).

life of a human being." United States v. Rosciano, 499 F. 2d 166, 173 (7th Cir. 1974) (Swygert, J., dissenting). Unfortunately, as Chief Justice Burger has lamented:

> "In part, the terrible price we are paying in crime is because we have tended -- once the drama of the trial is over -- to regard all criminal as human rubbish.... We lawyers and judges sometimes tend to fall in love with procedures and techniques and formalism.... The imbalance in our system of criminal justice must be corrected so that we give at least as much attention to the defendant after he is found guilty as before.
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> "Whether we find it palatable or not, we must proceed, in the face of bitter contrary experiences, in the belief that every human being has a spark somewhere hidden in him that will make...possible...redemption and rehabilitation. If we accept the idea that each human, however bad, is a child of God, we must look for that spark." 5 Trial, at 15 (Oct. - Nov. 1969).

In any decisionmaking process there inheres the possibility of arbitrariness and fallibility. Far from being an exception, the sentencing process by its very nature establishes this proposition in spades.

> "Largely unfettered by limiting standards, and thus having neither occasion nor meaningful terms for explaining, the judge usually supplies nothing in the way of a coherent and rational judgment when he informs the defendant of his fate."

M. Frankel, Criminal Sentences: Law Without Order 39 (1973).[39a]

Our legal system has traditionally recognized that the sentencing judge in

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39a As the American Bar Association has so tellingly observed: "Among the ironies of the law, there are many surrounding the manner in which sentences are imposed in the majority of our jurisdictions. One of the most striking involves a comparison of the methods for determining guilt and the methods for determining sentence. The guilt-determination process is hedged in with many rules of evidence, with many tight procedural rules, and, most importantly for present purposes, with a carefully structured system of appellate review designed to ferret out the slightest error. Yet in the vast majority of criminal convictions in this country -- 90% in some jurisdictions; 70% in others -- the issue of guilt is not disputed.

What is disputed and, in many more than the guilty-plea cases alone, what is the only real issue at stake, is the question of the appropriate punishment. But by comparison to the care with which the less-frequent problem of guilt is resolved, the protections in most jurisdictions surrounding the determination of sentence are indeed miniscule. A.B.A. Standards Relating to Appellate Review of Sentences 1 (1968).

the federal system has wide latitude in determining what sentence to impose. See e.g., United States v. Tucker, 404 U.S. 443, 446 (1972). But we have also come to the recognition that because a civilized system of punishments must rank some punishments as more severe than others, "higher standards of clarity and certainty in administration [are] required for the imposing of severe penalties...." C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 32 (1974), Cf. Furman v. Georgia, 408 U.S. 238 (1972). The hallmark of Due Process of law is the flexibility of the procedural safeguards for fairness and justice that will be required in varying situations. Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). But "[t]he touchstone of the process is the protection of the individual against arbitrary action of government. Dent v. West Virginia, 129 U.S. 114, 123 (1889)." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). Surely, therefore, the "grievous loss" suffered by a defendant sentenced to prison for a life term of 45 years consecutive to a 35 year term calls for "some orderly process, however informal." Morrisey v. Brewer, 408 U.S. 471, 481, 482 (1972); (Due Process protections apply to parole revocation); Cf. Gagnon v. Scarpelli, 411 U.S. 778 (1973) (Due Process protections apply to probation revocation); Johnson v. Chairman of New York State Board of Parole, 500 F. 2d 925 (2d Cir.), vacated as moot, 95 S.Ct. 488 (1974) (Due Process protections apply to parole release decisionmaking); see also Project, "Parole Release Decisionmaking and the Sentencing Process," 84 Yale L. J. 810, 849-53 (1975).

The necessity for more rigorous procedural regularity in imposing an

extremely harsh sentence[39b] complements another primary concern of a decent, humane society in the imposition of punishment:

> "[A] severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, cf. Robinson v. California, [370 U.S. 660, 666 (1962)]; id., at 677 (Douglas, J., concurring); Trop v. Dulles, 356 U.S. 86, 114 (1958) (Brennan, J., concurring)], the punishment inflicted is unnecessary and therefore excessive." Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

Both these constraints -- procedural protections "as a meaningful hedge against erroneous action," Goss v. Lopez, 95 S. Ct. 729, 741 (1975), and tailoring sentences to minimize unnecessary suffering while advancing penal objectives -- further our profound commitment to "the prevalent modern philosophy that the punishment should fit the offender and not merely the crime." Williams v. New York, 337 U.S. 241, 247 (1949). As Judge Lumbard of this Court has indicated:

> "There is a sound basis for the requirement that the district judge individualize the defendant's sentence. The functions of criminal punishment are generally said to be specific deterrence, incapacitation, rehabilitation, general deterrence, education, and retribution. W. LaFave & A. Scott, Criminal Law § 5 (1972). Sentencing by type of crime alone would take account of only the last three purposes and would ignore the problems and capabilities of the particular defendant. The needs to deter, incapacitate, and rehabilitate a particular defendant require that sentences be individualized. Although our system of sentencing as presently administered has many deficiencies, see generally M. Frankel, [Criminal Sentences: Law Without Order (1973)], no one questions

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39b At the sentencing below defense counsel pointed out to the judge that the American Bar Association has recommended that except in the case of gross repeater offenders, the maximum time for "extreme cases" be 25 years (A. 865). See A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures § 3.1(c)(i) (1968).

> the desirability of individualizing sentences. '[S]entencing functions best when the judge demonstrates an understanding of individualized treatment, which means that the sentence must take into account the offender's needs.' Advisory Council of Judges of the National Probation and Parole Association. Guides for Sentencing 4-5 (1957) (emphasis original)."

United States v. Baker, 487 F. 2d 360, 363 (2d Cir. 1973) (Lumbard, J., dissenting) (footnote omitted). See also Woolsey v. United States, 478 F. 2d 139, 143-145 (8th Cir. en banc 1973). Only last year a unanimous en banc panel of this Court echoed Judge Lumbard's thinking and set this Circuit squarely in support of the proposition that:

> "[e]ach sentence is based to a greater or lesser extent on one or more of these factors [deterrence, retribution, rehabilitation and protection of the public] and the mix is ultimately to be based upon an examination of the individual's case rather than a 'fixed sentencing policy based on the category of the crime,' for example, or some uniform or mechanical sentencing policy. See generally United States v. Baker, 487 F. 2d 360 (2d Cir. 1973)."

United States v. Kaylor, 491 F. 2d 1133, 1139-40 (2d Cir. en banc 1974). "[S]entencing procedures are not immune from scrutiny under the Due Process Clause..." even though the sentence imposed may be within the statutory limits United States v. McCord, 466 F. 2d 17, 21 (2d Cir. 1972).Therefore appellate courts are no longer permitted to stay their hands in the face of serious claims of irregularity in a sentencing proceeding. As the Supreme Court, speaking through Chief Justice Burger, only recently noted:

> "Appellate modification of a statutorily-authorized sentence ...is an entirely different matter than the careful scrutiny of the judicial process by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases. United States v. Hartford, 489 F. 2d 652, 654 (CA5 1974). (Emphasis in original)."

Dorszynski v. United States, supra, 418 U.S., at 443. Accordingly, an appellate court is obligated "to scrutinize the sentencing process in

some detail" in cases in which the sentencing process "was infested with fundamental defects resulting in a miscarriage of justice" or was inconsistent with "rudimentary demands of fair procedure," United States v. Malcolm, 432 F. 2d 809, 816 (2d Cir. 1970). Such circumstances include, inter alia, reliance on materially false or erroneous information, Townsend v. Burke, 334 U.S. 736, 741 (1948), reliance "on a foundation of confusion, misinformation add ignorance of facts virtually material to mitigation," United States v. Malcolm, supra, 481 F. 2d, at 556, failure to evaluate relevant information with due regard to the factors appropriate to sentencing, United States v. Daniels, supra, 446 F. 2d, at 967, and reliance on evidence of convictions illegally obtained, United States v. Tucker, 404 U.S. 443 (1972); McGee v. United States, 462 F. 2d 243 (2d Cir. 1972).

The court below imposed the harshest possible sentence upon Pacelli in a manner that offends these established principles governing the Due Process protections in the sentencing process. The judge politely listened to defense counsel and defendant's statements -- and the prosecution's adamant insistence upon the most severe sanction. Then, after mentioning that "the imposition of sentencing is always difficult," he confessed that he found it "extremely difficult in this case" (T. 38). Nevertheless, he never gave any meaningful insight into the justification for the maximum sentence. He never responded to any of defense counsel or defendant's arguments. In fact, he expressly and erroneously relied upon defendant's "two prior convictions in this court for very serious crimes," despite defense counsel's earlier statement that defendant stood before the court for sentencing on this offense as a first offender (A. 864-5) (which he clearly was since at the time of the Parks murder he had never been convicted of a criminal offense of any kind). In all, the judge's extraordinarily

abbreviated justification for 80 years of imprisonment[40] consumed less than 30 seconds.

Assuming arguendo that this unresponsive, truncated declaration by the trial court could even be called a statement of reasons, this Circuit has recognized that "a statement of reasons may be so perfunctory or otherwise inadequate to amount to a failure to provide a reasoned explanation." McGee v. United States, 465 F. 2d 357, 358 (2d Cir. 1972). The salutary effect of an amplified statement of the rationale for a sentence, most particularly under the circumstances here, is manifest:

> "A sphinx-like silence on the court's part precludes anyone (including the parties, the judge, and an appellate tribunal) from learning whether he acted in error." United States v. Brown, 479 F. 2d 1173 (2d Cir. 1973).

What this Court has termed "the highly desirable course of making explicit a factor...deemed material for the sentence, United States v. Velasquez, 482 F. 2d 139, 142 (2d Cir. 1973); United States v. Brown (2d Cir. 1973),"[41]

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40 "Among the traditional and accepted general principles to be followed in imposing sentence I have in mind especially the need for protection of the public, the need for deterrence or others."

"The crime of which you have been convicted is a particularly deliberate, callous, brutal crime. Of course quite different from the two crimes which you have been previously convicted" (A. 882-3).

41 "[A rule requiring a sentencing judge to state his reasons] would be a 'powerful safeguard against rash and arbitrary decisions' at this crucial stage of the criminal process where the defendant's liberty is at stake. M. Frankel, Criminal Sentences--Law Without Order 41 (Hill and Wang 1972). It would serve 'to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies—and finally, to make him show that these necessities have been served.' Id. at 40. It would also promote fairness by minimizing the risk that the sentencing judge might rely on misinformation or on inaccuracies in the presentence report. See United States v. Needles, 472 F. 2d 652 (2d Cir. 1973). If a misapprehension on the court's part were disclosed, the defendant and his counsel would then have the opportunity to answer and explain, pointing out the error." United States v. Brown, supra, 479 F. 2d, at 1173-14. See also Dorzynski v. United States, 418 U.S. 424, 455-56 (1974).

United States v. Hendrix, 505 F. 2d 1233, 1235 (2d Cir. 1974),[42] translates into a constitutional imperative[43] when the stakes are as high as they were in this case.

The necessity here for a responsive statement of reasons becomes all the more evident in light of defense counsel's argument at sentencing that defendant was being effectively punished for the third time for the same offense. At the time defendant was first sentenced by Judge Pollack in 71 CR. 614 for narcotics violations, Patsy Parks had been murdered. In fact two days after the trial in 71 CR. 614 began, defendant was remanded by Judge Pollack because of her death. We need not speculate whether the facts surrounding the murder were before Judge Pollack.

On April 6, 1972, according to the conversation between AUSA Feffer and Lipsky's attorney, Gwinn, Feffer told Gwinn he needed information from Lipsky about Pacelli because Pacelli "is going to be sentenced next week" and they therefore had "a time problem" (See Pacelli v. Pollack, DK. No. 73-689; Pacelli's Appendix in U.S. v. Mallah, 74-1327, p. 39). On April 11, 1972, Feffer told Gwinn that petitioner's sentence in Pacelli I "was put over for a month...for reasons you can understand" (Id. at 48). After getting requested "information" from Lipsky, Mr. Feffer reported to Gwinn on May 22,

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42 The Hendrix sentencing judge stated in open court at sentencing that because he was convinced beyond a reasonable doubt that defendant had perjured himself on the witness stand, he felt he had added two years to his sentence for this perjury. 505 F. 2d, at 1234-35.

43 Wholly apart from minimum constitutional standards for the administration of criminal justice an appellate court also exercises supervisory power over a sentencing court. See Yates v. United States, 356 U.S. 363, 366-67 (1958); United States v. Daniels, 446 F. 2d 967 (6th Cir. 1971); Woolsey v. United States, 478 F. 2d 139, 146 (8th Cir. en banc 1973); United States v. McCord, 466 F. 2d 17, 24 (2d Cir. 1972) (Feinberg, J., dissenting).

1972 that petitioner was to be sentenced "this afternoon" and "I think he'll get a pretty stiff sentence" (Id. at 72). Thereafter, Judge Pollack, after declining to permit examination of the presentence report,[44] expressed his view that defendant was "an amoral and hardened individual" and that defendant appeared to have "been involved in narcotics trafficking on a large scale and manner." Id. at 7 (a judgment in no way warranted by the proof at trial. See United States v. Pacelli, 470 F. 2d 67 (2d Cir. 1972)). Judge Pollack sentenced defendant to twenty years in prison plus a special parole term thereafter of three years.

Judge Pollack next sentenced defendant in 73 CR. 881 on March 15, 1974. By that time defendant stood convicted of the Parks murder and his conviction had been reversed and remanded for new trial. Judge Pollack sentenced Pacelli to fifteen years consecutive to the twenty year sentence he had previously imposed in 71 CR. 614 on May 22, 1972.[45] This time counsel was permitted to examine the presentence report. This most significant sentencing document was replete with three to four pages of references to Pacelli's involvement in the Parks murder.

Defense counsel argued at sentencing that imposition of the life sentence consecutive to 35 years would be greater than the life sentence consecutive to the 20 year sentence imposed by Judge Tenney following defendant's conviction in the first trial of this case (A. 864). This more extreme sentence on retrial after defendant's successful appeal, defense counsel submitted, would violate North Carolina v. Pearce, 395 U.S. 711, 724-25 (1969):

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44 See Tr. of May 22, 1972 in 71 CR. 614, at p. 2.

45 Judge Pollack also fined defendant $75,000 plus costs of prosecution and imposed three years special parole following the thirty five year prison term.

> "'A defendant's exercise of a right to appeal must be free and unfettered. ....[I]t is unfair to use the great power given the court to determine sentence to place a defendant in the dilemma of making an unfree choice.' ...
>
> Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be free of apprehension of such a retaliatory motivation on the part of the sentencing judge."

Despite the manifest applicability of Pearce, the sentencing Court again sat mute and did not respond to defense counsel's argument. This silence is not only baffling; it is unconstitutional.

> "[W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the consitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id. at 726.

By denying defense counsel's request to make Judge Pollack's presentence reports a part of the record,[46] the trial court failed to disclose a material factor bearing upon the appropriateness of defendant's sentence. By failing even to make a specific finding for the record on the controverted and highly relevant issue of what information concerning the murder was before Judge Pollack, the court below maximized the likelihood of egregious error. By failing to state for the record the reasons for selecting the maximum punishment -- in the face of substantial evidence that Judge Pollack

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46 As of August 1, 1975, mandatory disclosure of presentence reports to the defense will be the rule rather than the exception under new Rule 32(c)(3) of the Federal Rules of Criminal Procedure. See Pub. L. No. 93-361, July 30, 1974, 88 Stat. 397.

weighed heavily the Parks murder in his meting out 35 years in two previous sentences -- the trial court precluded any meaningful appellate scrutiny of the legitimacy of the sentencing process and the appropriateness of the sentence.

The gravamen of defendant's argument at sentencing was that the Parks murder affected his two prior sentences by Judge Pollack and that this was a legitimate mitigating factor in imposing sentence in this case. "To purge this possible taint" the trial judge should either have given a considerably less extreme sentence or have given at least a summary explanation of his reasons for declining to do so. Cf. North Carolina v. Pearce, 395 U.S. 711, 725-726...(1969)." McGee v. United States, supra, 462 F. 2d at 247; see also United States v. Driscoll, 496 F. 2d 252, 254 (2d Cir. 1974) (sentencing judge should give a statement of reasons when imposing harsh consecutive sentences). Woolsey v. United States, supra, 478 F. 2d at 147 (error under the circumstances not to give reasons when imposing maximum sentence).

The sentencing court's failure to breathe any life into the barren sentencing minutes also effectively precluded defendant from rebutting any claim that the Parks murder was an important consideration in Judge Pollack's sentencing.

> "[W]e are faced with a disturbing record that discloses only that defendant was given a lengthy sentence on the basis of possibly erroneous information and that the district court, without stating reasons, refused to permit rebuttal of the factual assumption." United States v. Espinoza, 481 F. 2d 553, 558 (5th Cir. 1973); see also United States v. Rosner, 485 F. 2d 1213, 1229-31 (2d Cir. 1973).

The sentencing of Vincent Pacelli to 80 years imprisonment was "an empty ritual," United States v. Malcolm, supra, 432 F. 2d at 818, unattended by

the elementary due process safeguards required in such a situation. The trial court's failure to make a statement of facts responsive to the serious questions raised deprived defendant of his right to an individualized, nonvindictive sentence free of confusion and misinformation and no more severe than necessary to further the effective administration of criminal justice. The sentences must be vacated and remanded for resentencing. McGee v. United States, supra, 462 F. 2d at 247 n. 8; James v. United States, 476 F. 2d 936, 937 (8th Cir. 1973); United States v. Kaylor, supra, 491 F. 2d 1133, 141. Upon remand, the sentencing should be before a different judge, United States v. Rosner, supra, 485 F. 2d at 1231, and prior to resentencing, defendant should be afforded an opportunity to examine the questioned presentence reports and to present appropriate argument. Shelton v. United States, 497 F. 2d 156 (5th Cir. 1974); United States v. Murphy, 497 F. 2d 126 (5th Cir. 1974); United States v. Rollerson, 491 F. 2d 1209 (5th Cir. 1974).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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